

A — The Court of Justice in 2007: changes and proceedings

By Mr Vassilios Skouris, President of the Court of Justice

This part of the Annual Report gives an overview of the activity of the Court of Justice of the European Communities in 2007. It describes, first, how the institution evolved during that year, with the emphasis on the institutional changes that have affected the Court and developments relating to its internal organisation and working methods (Section 1). It includes, second, an analysis of the statistics in relation to developments in the Court's workload and the average duration of proceedings (Section 2). It presents, third, as each year, the main developments in the case-law, arranged by subject matter (Section 3).

1. The main development in 2007 for the Court as an institution was the completion of the legislative process for the establishment of an urgent preliminary ruling procedure enabling questions relating to the area of freedom, security and justice that are referred for a preliminary ruling to be dealt with expeditiously and appropriately.

Specifically, by decision of 20 December 2007, the Council adopted the amendments to the Statute and to the Rules of Procedure of the Court of Justice designed to establish an urgent preliminary ruling procedure. This is a new type of preliminary ruling procedure, created to deal with cases that are currently covered by Title IV of the EC Treaty (visas, asylum, immigration and other policies related to free movement of persons) and Title VI of the Treaty on European Union (provisions on police and judicial cooperation in criminal matters). After establishing that existing procedures, including the accelerated procedure under Article 104a of the Rules of Procedure, were not capable of ensuring that this category of cases would be dealt with sufficiently expeditiously, the Court proposed the creation of this new procedure in order to be able to decide such cases within a particularly short time and without delaying the handling of other cases pending before the Court.

The amendments to the Statute and the Rules of Procedure will enter into force in the first quarter of 2008. The principal features of the urgent preliminary ruling procedure are apparent from the differences between it and the ordinary and accelerated preliminary ruling procedures. First, the written procedure is limited to the parties to the main proceedings, the Member State from which the reference is made, the European Commission and the other institutions if a measure of theirs is at issue. The parties and all the interested persons referred to in Article 23 of the Statute will be able to participate in an oral procedure, when they can express a view on the written observations that have been lodged. Second, cases subject to the urgent preliminary ruling procedure will, as soon as they arrive at the Court, be assigned to a chamber of five judges that is specially designated for this purpose. Finally, the procedure in these cases will for the most part be conducted electronically, since the new provisions of the Rules of Procedure allow procedural documents to be lodged and served by fax or e-mail.

2. The statistics concerning the Court's judicial activity in 2007 reveal a distinct improvement compared with the preceding year. In particular, the reduction, for the fourth year in a row, of the duration of proceedings before the Court should be noted, as should the increase of approximately 10 % in the number of cases completed compared with 2006.



The Court completed 551 cases in 2007 compared with 503 in 2006 (net figures, that is to say, taking account of the joinder of cases). Of those cases, 379 were dealt with by judgments and 172 gave rise to orders. The number of judgments delivered and orders made in 2007 is appreciably higher than in 2006 (351 judgments and 151 orders).

The Court had 580 new cases brought before it, the highest number in its history ⁽¹⁾, representing an increase in new cases of 8 % compared with 2006 and 22.3 % compared with 2005. The number of cases pending at the end of 2007 (741 cases, gross figure) did not, however, increase significantly beyond the number at the end of 2006 (731 cases, gross figure).

The statistics concerning judicial activity in 2007 also reflect the constant reduction in the duration of proceedings since 2004. So far as concerns references for a preliminary ruling, the average duration of proceedings was 19.3 months, as against 19.8 months in 2006 and 20.4 months in 2005. A comparative analysis shows that in 2007 (as was the case in 2006) the average time taken to deal with references for a preliminary ruling reached its shortest since 1995. The average time taken to deal with direct actions and appeals was 18.2 months and 17.8 months respectively (20 months and 17.8 months in 2006).

In the past year, the Court has made use to differing degrees of the various instruments at its disposal to expedite the handling of certain cases (priority treatment, the accelerated or expedited procedure, the simplified procedure, and the possibility of giving judgment without an opinion of the Advocate General). Eight requests were made to the Court for use of the expedited or accelerated procedure, but the cases did not display the exceptional circumstances (of urgency) required by the Rules of Procedure. Following a practice established in 2004, requests for the use of the expedited or accelerated procedure are granted or refused by reasoned order of the President of the Court. On the other hand, priority treatment was granted in five cases.

Also, the Court continued to use the simplified procedure laid down in Article 104(3) of the Rules of Procedure to answer certain questions referred to it for a preliminary ruling. A total of 18 cases were brought to a close by orders made on the basis of that provision.

Finally, the Court made significantly more frequent use of the possibility offered by Article 20 of the Statute of determining cases without an opinion of the Advocate General where they do not raise any new point of law. About 43 % of the judgments delivered in 2007 were delivered without an opinion (compared with 33 % in 2006).

As regards the distribution of cases between the various formations of the Court, it may be noted that the Grand Chamber dealt with approximately 11 %, chambers of five judges with roughly 55 %, and chambers of three judges with about 33 % of the cases brought to a close in 2007. The number of cases dealt with by the Grand Chamber was roughly the same as in the previous year, the number of cases dealt with by five-judge chambers declined slightly (63 % in 2006) and the number of cases dealt with by three-judge

(¹) With the exception of the 1 324 cases brought in 1979. However, that exceptionally high figure can be explained by the huge flood of actions for annulment with the same subject matter that were brought.



chambers increased (24 % in 2006). The distribution of cases between the various formations of the Court was in fact almost identical to that in 2005.

Part C of this chapter should be consulted for further information regarding the statistics for the 2007 judicial year.

3. This section presents the main developments in case-law, arranged by topic as follows: constitutional or institutional issues; European citizenship; free movement of goods; free movement of persons, services and capital; visas, asylum and immigration; competition rules; taxation; approximation and harmonisation of laws; trade marks; economic and monetary policy; social policy; environment; judicial cooperation in civil matters; police and judicial cooperation in criminal matters, and combating terrorism.

Quite frequently, however, a judgment which, on the basis of the main issue addressed by it, comes under a given topic also broaches questions of great interest concerning another topic.

Constitutional or institutional issues

Given the vast range of matters that fall within this topic, it is not surprising that the issues ruled upon in the judgments mentioned are very diverse.

Although dealt with in much previous case-law, determination of the appropriate legal basis for the adoption of Community legislation continues to be the subject of cases brought before the Court.

In Case [C-440/05](#) *Commission v Council* (judgment of 23 October 2007), the Commission took the view that the Council framework decision to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution ⁽²⁾, which had been adopted within the framework of police and judicial cooperation in criminal matters, was founded on an inappropriate legal basis. Supported by the European Parliament, it brought an action for annulment in which it submitted that the aim and the content of the framework decision were covered by the powers of the European Community regarding the common transport policy.

The Court pointed out, first, that, in a situation where the EC Treaty and the Treaty on European Union are both capable of applying, the latter provides that the EC Treaty prevails and, second, that it is the task of the Court to ensure that acts which, according to the Council, fall within the provisions relating to police and judicial cooperation in criminal matters do not encroach upon the powers of the Community. The Court then established that the purpose of the framework agreement was to enhance maritime safety and to improve protection of the marine environment against ship-source pollution.

⁽²⁾ Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution (OJ 2005 L 255, p. 164). It supplements Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements (OJ 2005 L 255, p. 11).



Accordingly, the provisions of the framework agreement requiring Member States to apply criminal penalties to certain forms of conduct could have been validly adopted on the basis of the EC Treaty. The Court stated that, although it is true that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence, the fact remains that, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, the Community legislature may require the Member States to introduce such penalties in order to ensure that the rules which it lays down regarding protection of the environment are fully effective.

By contrast, the provisions of the framework agreement relating to the type and level of the applicable criminal penalties did not fall within the Community's sphere of competence. However, inasmuch as those provisions were inseparable from those concerning the criminal offences to which they related, the Court concluded that the Council framework decision encroached upon the Community's competence regarding maritime transport, in breach of the Treaty on European Union which gives priority to such competence. The framework decision, being indivisible, was therefore annulled in its entirety.

It is worth noting several cases that deal with the extent of the Court's jurisdiction to give preliminary rulings interpreting measures or determining their validity.

In its judgment of 11 September 2007 in Case [C-431/05](#) *Merck Genéricos-Produtos Farmacêuticos*, the Court, asked by the Portuguese Supreme Court of Justice whether it has jurisdiction to interpret Article 33 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement) ⁽³⁾, answered in the affirmative, stating that, since the TRIPs Agreement was concluded by the Community and its Member States by virtue of joint competence, the Court has jurisdiction to define the obligations which the Community thereby assumed and, for that purpose, to interpret the provisions of the TRIPs Agreement. The matter of the sharing of competence between the Community and its Member States calls for a uniform reply at Community level that the Court alone is capable of supplying. In relation more specifically to the case in point, the Court held that there is some Community interest in considering it as having jurisdiction to interpret Article 33 of the TRIPs Agreement — which relates to the minimum term of patent protection — in order to ascertain whether it is contrary to Community law for that provision to be given direct effect.

Continuing the line of case-law in *Dzodzi* ⁽⁴⁾ and *Leur-Bloem* ⁽⁵⁾ and, recently, in *Poseidon Chartering* ⁽⁶⁾, the Court held once again, in its judgment of 11 December 2007 in Case

⁽³⁾ Agreement on Trade-Related Aspects of Intellectual Property Rights, constituting Annex 1C to the Agreement establishing the World Trade Organisation, signed at Marrakesh on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

⁽⁴⁾ Joined Cases C-297/88 and C-197/89 [1990] ECR I-3763.

⁽⁵⁾ Case C-28/95 [1997] ECR I-4161.

⁽⁶⁾ Case C-3/04 [2006] ECR I-2505.



[C-280/06](#) *Autorità Garante della Concorrenza e del Mercato*, that, in the particular case where it adjudicates on references for a preliminary ruling in which the rules of Community law whose interpretation is requested are applicable only because of a reference made to them by national law, that is to say where, in regulating purely internal situations, domestic legislation provides the same solutions as those adopted in Community law, it is clearly in the Community interest that, in order to avoid future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly irrespective of the circumstances in which they are to apply, by means of judgments of the Court given on references for a preliminary ruling. The Court consequently supplied the interpretation sought by the national court.

The Court also held, in its judgment of 27 September 2007 in Case [C-351/04](#) *Ikea Wholesale*, that, given their nature and structure, the WTO (World Trade Organisation) agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions. It is only where the Community has intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules.

In a very different field, the Court held, by judgment of 28 June 2007 in Case [C-331/05 P](#) *Internationaler Hilfsfonds v Commission*, that costs relating to proceedings before the European Ombudsman, which do not qualify as recoverable costs ⁽⁷⁾, also cannot be payable by the institution concerned on the basis of non-contractual liability of the Community, given that there is no causal link between the loss and the wrongful act in question as such costs are incurred at the free choice of the persons concerned.

The public's right of access to documents of the institutions also gave rise to litigation. In Case [C-266/05 P](#) *Sison v Council* [2007] ECR I-1233, the Court was called upon to adjudicate on several decisions refusing even partial access to a person who requested (i) access to the documents that had led the Council to include and maintain him on the list of persons whose funds and financial assets were to be frozen pursuant to Regulation No 2580/2001 ⁽⁸⁾ and (ii) disclosure of the identity of the States which had provided certain documents in that connection.

The Court recalled that the judicial review conducted by it is necessarily limited in the case of an area which involves political, economic and social choices on the part of the Community legislature, and in which the latter is called upon to undertake complex assessments.

That said, it held that the purpose of Regulation No 1049/2001 ⁽⁹⁾ is to give the general public a right of access to documents of the institutions and not to lay down rules designed

⁽⁷⁾ See Article 91(b) of the Rules of Procedure of the Court of First Instance.

⁽⁸⁾ Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70).

⁽⁹⁾ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).



to protect the particular interest which a specific individual may have in gaining access to one of them and that, inasmuch as exceptions to the right of access that are justified by certain public and private interests are involved, the particular interest of an applicant in obtaining access to documents cannot be taken into account by the institution called upon to rule on the question of whether the disclosure to the public of those documents would undermine the interests for which the Community legislature sought protection and to refuse, if that is the case, the access requested.

The Court then observed that, even assuming that the appellant had a right to be informed in detail of the nature and cause of the accusation made against him, which led to his inclusion on the list at issue, and even if that right entailed access to documents held by the Council, such a right could not be exercised by having recourse to the mechanisms for public access to documents of the institutions.

In respect of documents whose content is extremely sensitive, the Court held that the originating authority is entitled to require secrecy as regards even the existence of a sensitive document and also has the power to prevent disclosure of its own identity in the event that the existence of that document should become known, a conclusion which cannot be considered disproportionate on the ground that it may give rise, for an applicant refused access, to additional difficulty, or indeed practical impossibility, in identifying the State of origin of that document.

With regard to citizens' access not to documents but to the rule of law, the Court was required in its judgment of 11 December 2007 in Case [C-161/06 Skoma Lux](#) to decide on the effect of Article 58 of the 2004 Act of Accession ⁽¹⁰⁾. Asked by a Czech court whether that Article 58 allows the provisions of a Community regulation which has not been published in the *Official Journal of the European Union* in the language of a Member State, although that language is an official language of the Union, to be enforced against individuals in that State, the Court held that that lack of publication renders the obligations contained in Community legislation unenforceable against individuals in that State, even though those persons could have learned of the legislation by other means. In so deciding, the Court was interpreting Community law and not assessing its validity.

In the field of the relationship between Community law and the Member States' national law, the Court clarified certain matters relating to the primacy and direct effect of Community law.

⁽¹⁰⁾ Act concerning the conditions of accession to the European Union of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003, L 236, p. 33).

Article 58 of the Act provides that:

'The texts of the acts of the institutions, and of the European Central Bank, adopted before accession and drawn up by the Council, the Commission or the European Central Bank in the Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Slovak and Slovenian languages shall, from the date of accession, be authentic under the same conditions as the texts drawn up in the present 11 languages. They shall be published in the *Official Journal of the European Union* if the texts in the present languages were so published.'



In its judgment of 18 July 2007 in Case [C-119/05 *Lucchini*](#), the Court, applying the principles laid down in a line of cases starting with *Simmenthal* ⁽¹¹⁾, found that Community law precludes the application of a provision of Italian law which seeks to lay down the principle of *res judicata* in so far as the application of that provision prevents the recovery of State aid which was granted in breach of Community law and which has been found to be incompatible with the common market in a decision of the Commission that has become final.

In its judgment of 7 June 2007 in Case [C-80/06 *Carp*](#), the Court had to address the question of the horizontal direct effect of decisions. It found that Decision 1999/93 on the procedure for attesting the conformity of construction products pursuant to Article 20(2) of Directive 89/106 ⁽¹²⁾ is an act of general application which specifies the types of attestation of conformity procedures that are applicable and authorises the European Committee for Standardisation (CEN/Cenelec) to specify the content of those procedures in the relevant harmonised standards, which will then be transposed by the standardisation bodies of each Member State, but is binding only upon the Member States, which are the sole addressees of the decision. Consequently, an individual cannot rely on the decision in the context of legal proceedings against another individual concerning contractual liability.

Two judgments provided explanation regarding the approach to be adopted by national courts when faced with international agreements concluded by the Community.

In its judgment of 20 September 2007 in Case [C-16/05 *Tum and Dari*](#), the Court was required to rule on the effect of the 'standstill' clause contained in Article 41(1) of the Additional Protocol to the EEC–Turkey Association Agreement ⁽¹³⁾, under which the contracting parties are prohibited from introducing any new restrictions on the freedom of establishment from the date of entry into force of that protocol. The case in point concerned two Turkish nationals who wished to establish themselves in the United Kingdom of Great Britain and Northern Ireland.

In the Court's view, this unequivocal provision has direct effect, and it does not operate in the same way as a substantive rule, rendering inapplicable the relevant substantive law concerning entry into the territory of a Member State that it replaces, but as a quasi-procedural rule, stipulating, *ratione temporis*, which are the provisions of a Member State's immigration legislation that must be referred to for the purposes of assessing the position of a Turkish national who wishes to exercise freedom of establishment. Accordingly, the 'standstill' clause does not call into question the competence, as a matter of principle, of the Member States to conduct their national immigration policy. The mere fact that, as from its entry into force, such a clause imposes on those States a duty not to act which has the effect of limiting, to some extent, their room for manoeuvre on such matters does not mean that the very substance of their sovereign competence in respect of aliens should be regarded as having been undermined.

⁽¹¹⁾ Case 106/77 *Simmenthal* [1978] ECR 629.

⁽¹²⁾ Commission Decision 1999/93/EC of 25 January 1999 on the procedure for attesting the conformity of construction products pursuant to Article 20(2) of Council Directive 89/106/EEC as regards doors, windows, shutters, blinds, gates and related building hardware (OJ 1999 L 29, p. 51).

⁽¹³⁾ Additional Protocol signed on 23 November 1970 at Brussels and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1977 L 361, p. 60).



The Court then interpreted the provision in question as prohibiting the introduction, as from the entry into force of the Additional Protocol to the EEC–Turkey Association Agreement with regard to the Member State concerned, of any new restrictions on the exercise of freedom of establishment, including those relating to the substantive and/or procedural conditions governing the first admission into the territory of that State, of Turkish nationals intending to establish themselves in business there on their own account.

In *Merck Genéricos-Produtos Farmacêuticos*, the Court was asked by the Portuguese Supreme Court of Justice whether national courts must, on their own initiative or at the request of one of the parties, apply Article 33 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement) — which relates to the minimum term of patent protection — in proceedings pending before them.

After observing that it has jurisdiction to interpret the provisions of the TRIPs Agreement, the Court stated that, in this context, it is necessary to distinguish between fields in which the Community has not yet legislated and those in which it already has. As regards the former fields, which still fall within the competence of the Member States, the Court held that the protection of intellectual property rights and measures taken for that purpose by the judicial authorities do not fall within the scope of Community law, so that Community law neither requires nor forbids the legal order of a Member State to accord to individuals the right to rely directly on a rule laid down in the TRIPs Agreement or to oblige the courts to apply that rule of their own motion. In the case of the latter fields, on the other hand, Community law applies, which means that it is necessary, as far as may be possible, to supply an interpretation in keeping with the TRIPs Agreement, although no direct effect may be given to the provision of that agreement at issue.

In the case in point, the Court found that the Community has not yet exercised its powers in the sphere of patents, within which Article 33 of the TRIPs Agreement falls, or that, at the very least, at internal level, that exercise has not to date been of sufficient importance to lead to the conclusion that, as matters now stand, that sphere falls within the scope of Community law. It drew the conclusion that it is not currently contrary to Community law for Article 33 of the TRIPs Agreement to be directly applied by a national court subject to the conditions provided for by national law.

Finally, there are three noteworthy judgments concerning the effective judicial protection of rights derived from Community law that is to be enjoyed by individuals.

In Case [C-432/05 Unibet](#) [2007] ECR I-2271, the Court, after pointing out that the principle of effective judicial protection is a general principle of Community law, repeated the standard case-law that, in the absence of Community rules governing the matter, it is for each Member State, in accordance with its duty of cooperation, to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law. This procedural autonomy, which is limited by the principles of equivalence and effectiveness, could be called into question only if it were apparent from the overall scheme of the national legal system in question that no legal remedy exists which makes it possible to ensure, even indirectly, respect for an individual's rights under Community law.



That having been said, the Court observed that the principle of effective judicial protection of an individual's rights under Community law does not require domestic law to provide a free-standing action for an examination of whether national provisions are compatible with Community law, provided that other effective legal remedies, which are no less favourable than those governing similar domestic actions, make it possible for such a question of compatibility to be determined as a preliminary issue, which is a matter for the national court to establish. In concrete terms, if an individual is forced to be subject to administrative or criminal proceedings and to any penalties that may result as the sole form of legal remedy for disputing the compatibility of the contested national provision with Community law, his judicial protection is not effectively secured.

Finally, the Court inferred from the principle of effective judicial protection that the Member States are obliged to provide for the possibility of interim relief being granted to an individual until the competent court has given a ruling on whether the national provisions at issue are compatible with Community law, where the grant of such relief is necessary to ensure the full effectiveness of the judgment to be given. However, this possibility does not have to exist where the individual's application is inadmissible under the law of the Member State concerned, provided that Community law does not call into question that inadmissibility. In the absence of relevant Community legislation, the grant of any interim relief is governed by the criteria in national law, subject to observance of the principles of equivalence and effectiveness referred to above.

In Case [C-524/04](#) *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, the Court pointed out that, where a Member State has levied charges in breach of the rules of Community law, individuals are entitled to reimbursement of the tax unduly levied and of the amounts paid which relate directly to that tax.

As regards other loss or damage which a person has sustained by reason of a breach of Community law for which a Member State is liable, the latter is under a duty to make reparation for the loss or damage caused in the circumstances set out in the Court's case-law and — subject to the principles of equivalence and effectiveness — on the basis of the rules of national law on liability.

Specifically, where it is established that the legislation of a Member State constitutes an obstacle to freedom of establishment prohibited by Article 43 EC, the national court may, in order to establish the recoverable losses, determine whether the injured parties have shown reasonable diligence in order to avoid those losses or to limit their extent and whether, in particular, they availed themselves in time of all legal remedies available to them. However, the application of the provisions relating to freedom of establishment would be rendered impossible or excessively difficult if claims for restitution or compensation based on infringement of those provisions were rejected or reduced solely because the companies concerned had not applied to the tax authorities to be allowed to pay interest on loans granted by a non-resident parent company without that interest being treated as a distribution when, in the circumstances at issue, national law, combined, where appropriate, with the relevant provisions of the double taxation conventions, provided for such treatment to apply.



The Court also pointed out that, in order to determine whether there has been a sufficiently serious breach of Community law, it is necessary to take account of all the factors which characterise the situation brought before the national court. In a field such as direct taxation, the national court must take into account the fact that the consequences arising from the freedoms of movement guaranteed by the Treaty have been only gradually made clear, in particular by the principles identified by the Court's case-law.

In Joined Cases [C-222/05](#) to [C-225/05](#) *van der Weerd and Others* (judgment of 7 June 2007), the Court was asked in particular whether, in judicial proceedings concerning the legality of an administrative measure, Community law required a national court to conduct an examination of its own motion of grounds which were outside the terms of the dispute but based on Directive 85/511 introducing Community measures for the control of foot-and-mouth disease ⁽¹⁴⁾.

The Court replied in the negative, holding that neither the principle of equivalence nor the principle of effectiveness enshrined in its case-law required the national court to raise of its own motion a plea alleging infringement of Community law.

As regards the principle of equivalence, the Court held, more specifically, that the provisions of the directive which were at issue laid down neither the conditions in which procedures relating to the control of foot-and-mouth disease could be initiated nor the authorities which had the power, within the framework of those procedures, to determine the extent of the rights and obligations of individuals. Those provisions could not therefore be considered equivalent to the national rules of public policy, which lay at the very basis of the national procedures since they defined the conditions in which those procedures could be initiated and the authorities which had the power, within the framework of those procedures, to determine the extent of the rights and obligations of individuals. So far as concerns the principle of effectiveness, the Court stated that, provided that the parties are given a genuine opportunity to raise a plea based on Community law before a national court, this principle does not preclude a provision of domestic law which prevents national courts from raising of their own motion an issue as to whether the provisions of Community law have been infringed, where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of the Community provisions has based his claim; this is so, irrespective of the importance of those provisions to the Community legal order.

European citizenship

In several cases the Court examined national provisions that can improperly limit the free movement of citizens of the Union.

⁽¹⁴⁾ Council Directive 85/511/EEC of 18 November 1985 introducing Community measures for the control of foot-and-mouth disease (OJ 1985 L 315, p. 11), as amended by Council Directive 90/423/EEC of 26 June 1990 (OJ 1990 L 224, p. 13).



With regard to education and training grants, in its judgment of 23 October 2007 in Joined Cases [C-11/06](#) and [C-12/06](#) *Morgan and Bucher* the Court proceeded on the basis that nationals of a Member State studying in another Member State enjoy the status of citizens of the Union under Article 17(1) EC and may therefore rely on the rights conferred on those having that status, *inter alia* against their Member State of origin.

The Court then held that while, in principle, a Member State is entitled, in order to prevent education or training grants to students wishing to study in other Member States from becoming an unreasonable burden, to grant such assistance only to students who have demonstrated a certain degree of social integration, it must nevertheless see to it that the detailed rules for the award of the grants do not create an unjustified restriction of the free movement of citizens and that they are consistent with and proportionate to the objectives of ensuring that courses are completed in a short period of time or of facilitating an appropriate choice of education or training course.

The Court drew the conclusion that Articles 17 and 18 EC preclude provisions under which the award of an education or training grant to a student who is studying in a Member State other than that of which he is a national is subject to the condition that those studies must be a continuation of studies pursued for at least one year in his Member State of origin, in that such provisions are liable to deter citizens of the Union from making use of their freedom, provided for in Article 18 EC, to move and reside within the territory of the Member States.

With regard to tax legislation, in its judgments of 11 September 2007 in Case [C-76/05](#) *Schwarz and Gootjes-Schwarz* and [C-318/05](#) *Commission v Germany*, the Court examined provisions of the German law on income tax according to which taxpayers are granted tax relief for their children's school fees paid to certain private schools, provided that the schools are established on German territory.

The Court held that Community law precluded the tax relief from being refused generally for school fees paid to schools in another Member State. In its reasoning, the Court distinguished two types of school financing. Only schools essentially financed by private funds could rely on the freedom to provide services. In the case of schools established in a Member State other than Germany which were not essentially financed from private funds, the freedom to provide services did not apply but the tax relief nonetheless could not be refused. The rights conferred on citizens of the European Union prevented such an exclusion: even a young child could make use of the rights of free movement and residence, and the provisions at issue placed at an unjustifiable disadvantage children who went to a school established in another Member State by comparison with those who had not availed themselves of their freedom of movement.

Free movement of goods

In the field of the free movement of goods, the Court was required to rule on the compatibility of various national rules with the Treaty.

First, the judgment of 5 June 2007 in Case [C-170/04](#) *Rosengren and Others* resulted from a reference for a preliminary ruling relating to the compatibility with the EC Treaty of a



Swedish law prohibiting the importation by private individuals of alcoholic beverages, the sale of which is subject, in Sweden, to a monopoly established by the same law. The Court held this prohibition to be incompatible with Community law, having first established that the prohibition had to be assessed in the light of Article 28 EC, and not in the light of Article 31 EC on State monopolies of a commercial character, since it did not amount to a rule relating to the existence or operation of the monopoly, which concerned retail sale and not importation. In so holding, the Court found that the Swedish measure amounted to a quantitative restriction on imports within the meaning of Article 28 EC given, first, the possibility for the holder of the monopoly to refuse an order for the supply and therefore, if necessary, the importation of the beverages concerned and, second, the inconveniences of such a measure for consumers. The Court then found that the measure could not be justified, under Article 30 EC, on grounds of protection of the health and life of humans: the Swedish law was unsuitable for attaining the objective of limiting alcohol consumption generally, because of the marginal nature of its effects in that regard, and was not proportionate to the objective of protecting young persons against the harmful effects of such consumption, since the prohibition was applied irrespective of the age of the private individual wishing to obtain the beverages concerned.

Second, in Case [C-319/05 *Commission v Germany*](#) (judgment of 15 November 2007), the Court was faced once again, in an action for failure to fulfil obligations under the Treaty, with the question whether a substance should be classified as a medicinal product or as a foodstuff. The Federal Republic of Germany had classified as a medicinal product a garlic preparation in capsule form that was legally marketed as a food supplement in other Member States, and had consequently required prior marketing authorisation to be obtained for it. In accordance with its settled case-law the Court found that, in so doing, the Federal Republic of Germany had failed to fulfil its obligations under Articles 28 and 30 EC. After establishing that the product did not satisfy either the definition of medicinal product by presentation or the definition of medicinal product by function for the purposes of the relevant Community legislation ⁽¹⁵⁾, the Court held that the German measure created an obstacle to intra-Community trade. Furthermore, the measure could not be justified by reasons relating to the protection of public health, in accordance with Article 30 EC, since a provision of that type had to be based on a detailed assessment of the alleged health risk and a measure that restricted the free movement of goods less, such as suitable labelling warning consumers of the potential risks related to taking the product, could have met the objective of protecting health.

Finally, it is appropriate to mention the judgment of 20 September 2007 in Case [C-297/05 *Commission v Netherlands*](#), which refines the Court's case-law concerning national rules applicable to the import of vehicles registered in another Member State. Asked to decide whether Netherlands legislation requiring such vehicles to undergo an identification check and a roadworthiness test prior to registration in the Netherlands was compatible with Community law, the Court held, first of all, that the vehicle identification check did not constitute a hindrance to the free movement of goods. It was unlikely to have any deterrent effect whatsoever on the import of a vehicle into the Netherlands or to make the import of vehicles less attractive, given the manner in which it was carried out and the fact

⁽¹⁵⁾ Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67).



that it constituted a simple administrative formality which did not introduce any additional check and which was integral to the actual processing of the registration application and to the conduct of the associated procedure. Ruling, secondly, on whether the roadworthiness test relating to the general condition of vehicles at the time of their registration in the Netherlands was compatible with Articles 28 and 30 EC, the Court stated that a restrictive measure of that kind, when applied to vehicles more than three years old which had previously been registered in another Member State, was not proportionate to the legitimate objectives of road safety and the protection of the environment. The Court observed in this regard that less restrictive measures existed, such as recognition of the proof issued in another Member State showing that a vehicle registered in its territory had passed a roadworthiness test, and cooperation between the Netherlands customs authorities and their counterparts in other Member States concerning any data that might be missing.

Free movement of persons, services and capital

Case-law in this field was particularly abundant, making a well-ordered presentation difficult, in particular as the cases brought before the Court often concerned the exercise of several freedoms simultaneously. It has therefore been decided to divide the case-law into four areas, three of which reflect a sectoral approach, that is to say the free movement of workers, the right of establishment and the freedom to provide services, and the free movement of capital, while the fourth — namely the limitations imposed by those freedoms on the exercise by the Member States of their powers of taxation — involves a cross-sectoral approach.

With regard to the free movement of natural persons, that is to say of workers, the Court ruled, *inter alia*, on the right of residence of nationals of third countries who are members of the family of a Community national, in particular a Community migrant worker, and the social advantages which those family members may claim. It is also to be noted that the Court explained the concept of 'migrant worker' in its judgment of 18 July 2007 in Case [C-212/05 Hartmann](#). Thus, a national of a Member State who, while maintaining his employment in that State, has transferred his residence to another Member State and has since then carried on his occupation as a frontier worker can claim the status of migrant worker for the purposes of Regulation No 1612/68 ⁽¹⁶⁾.

In relation to the right of residence of nationals of third countries who are members of the family of a Community national who has exercised the right to freedom of movement, Case [C-1/05 Jia](#) [2007] ECR I-1 and Case [C-291/05 Eind](#) (judgment of 11 December 2007) warrant particular attention.

In *Jia*, the dispute before the national court concerned the case of a Chinese national who was the mother-in-law of a German national and went to join her son in Sweden where her daughter-in-law was self-employed. When her visitor's visa expired she was refused a residence permit on the ground that she had not provided adequate proof that she was

⁽¹⁶⁾ Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).



financially dependent on her son and his wife. The national court, referring to the judgment in Case C-109/01 *Akrich* [2003] ECR I-9607, essentially asked whether the lawful-residence condition that was adopted in that judgment also applied to the circumstances of the case in point. The Court stated in reply to this question that, having regard to the judgment in *Akrich*, Community law does not require Member States to make the grant of a residence permit to nationals of a third country, who are members of the family of a Community national who has exercised his or her right of free movement, subject to the condition that those family members have previously been residing lawfully in another Member State. However, such family members must be dependent on the Community national or his or her spouse in the sense that they need those persons' material support in order to meet their essential needs in their State of origin or the State from which they have come at the time when they apply to join them.

In *Eind*, the Court held that the right to family reunification under Article 10 of Regulation No 1612/68 does not entail for members of the families of migrant workers any autonomous right to free movement, since that provision benefits the migrant worker whose family includes a national of a third country. Accordingly, in the event of a Community worker returning to the Member State of which he is a national, Community law does not require the authorities of that State to grant a right of entry and residence to a third-country national who is a member of that worker's family because of the mere fact that, in the host Member State where that worker was gainfully employed, the third-country national held a valid residence permit issued on the basis of Article 10 of Regulation No 1612/68. However, when that worker returns to the Member State of which he is a national, after being gainfully employed in another Member State, a third-country national who is a member of his family has a right under Article 10(1)(a) of Regulation No 1612/68 as amended to reside in the Member State of which the worker is a national, even where that worker does not carry on any effective and genuine economic activities. The fact that a third-country national who is a member of a Community worker's family did not, before residing in the Member State where the worker was employed, have a right under national law to reside in the Member State of which the worker is a national has no bearing on the determination of the third-country national's right to reside in the latter State.

Community workers and members of their families who settle in a Member State can be entitled to the same social advantages as national workers. Thus, in *Hartmann* the Court held that Article 7(2) of Regulation No 1612/68 precludes the spouse of a migrant worker carrying on an occupation in one Member State, who does not work and is resident in another Member State, from being refused a social advantage with the characteristics of the German child-raising allowance on the ground that he did not have his permanent or ordinary residence in the former State. Such a residence condition must be regarded as indirectly discriminatory since it is intrinsically liable to affect migrant workers or their spouses, who reside with greater frequency in another Member State, more than national workers and there is a consequent risk that it will place the former at a particular disadvantage. On the other hand, in its judgment of 18 July 2007 in Case C-213/05 *Geven*, the Court stated that the same article does not preclude the exclusion, by the national legislation of a Member State, of a national of another Member State who resides in that other State and is in minor employment (fewer than 15 hours' work a week) in the former State from receipt of a social advantage such as a child-raising allowance on the ground that he does not have his permanent or ordinary residence in the former State. Likewise,



the Court held in its judgment of 11 September 2007 in Case [C-287/05 Hendrix](#) that Article 39 EC and Article 7 of Regulation No 1612/68 do not preclude national legislation which applies Articles 4(2a) and 10a of Regulation No 1408/71 ⁽¹⁷⁾, as amended, and provides that a special non-contributory benefit may be granted only to persons who are resident in the national territory. However, implementation of that legislation must not entail an infringement of the rights derived by a person from the free movement of workers which goes beyond what is required to achieve the legitimate objective pursued by the national legislation.

More specifically, in relation to social security the Court had to rule on the compatibility of certain provisions of Regulation No 1408/71 with freedom of movement for persons and with Article 42 EC in particular. Thus, in its judgment of 18 December 2007 in Joined Cases [C-396/05](#), [C-419/05](#) and [C-450/05 Habelt, Möser and Watcher](#), concerning payment of an old-age pension to displaced persons of German nationality or origin, the Court declared incompatible with freedom of movement for persons the authorisation given to the Federal Republic of Germany to make the taking into account of contribution periods completed outside the Federal Republic subject to the condition that the recipient resides in Germany. To allow the competent Member State to rely on grounds of integration into the social environment of that Member State in order to impose a residence clause would run directly counter to the fundamental objective of the Union, which is to encourage the movement of persons within the Union and their integration into the society of other States. Accordingly, the refusal of the national authorities to take account, for the purposes of calculating old-age benefits, of the contributions made abroad by a worker makes manifestly more difficult or even prevents the exercise by those concerned of their right to freedom of movement within the Union and therefore constitutes an obstacle to that freedom.

With regard to freedom of establishment and freedom to provide services, the Court, first, clarified the scope of the Treaty provisions in relation to situations involving an extra-Community element and, second, dealt with various restrictions.

In *Test Claimants in the Thin Cap Group Litigation*, concerning the legislation of a Member State relating to the deduction by a resident company, for tax purposes, of interest paid on loan finance granted by a parent company or a company controlled by a parent company, the Court held that relations between a company resident in one Member State and a company which is resident in another Member State or a non-member country and which does not itself control the first company, but which are both controlled, directly or indirectly, by a common parent company resident in a non-member country, are not covered by Article 43 EC. Also, in its judgment of 24 May 2007 in Case [C-157/05 Holböck](#) the Court held the provisions of the chapter of the EC Treaty on freedom of establishment to be inapplicable to a situation where a shareholder receives dividends from a company established in a non-member country. That chapter does not include any provision extending its application to situations which involve the establishment in a non-member country of a Member State national or of a company incorporated under the legislation of a Member State.

(17) Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416).



As regards restrictions, the first judgment to be mentioned was delivered in Case [C-338/04 Placanica](#) [2007] ECR I-1891 relating to the organisation of games of chance. The dispute before the national court concerned domestic legislation on the organisation of games of chance and the collection of bets that had been adopted in order to combat clandestine gaming and betting. Under the legislation, organisation of gaming and betting required, on pain of criminal penalties, prior grant of a licence and of a police authorisation. In addition, when awarding licences the competent national authorities excluded certain tenders, in particular from operators in the form of companies whose shares were quoted on the regulated markets. The Court held, directly following case-law laid down in Case [C-243/01 Gambelli and Others](#) [2003] ECR I-13031, that national legislation which prohibits, on pain of criminal penalties, the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, without a licence or a police authorisation issued by the Member State concerned constitutes a restriction on the freedom of establishment and the freedom to provide services, but that that restriction can be justified if, in limiting the number of operators active in the betting and gaming sector, it genuinely contributes to the objective of preventing the exploitation of activities in that sector for criminal or fraudulent purposes, a matter which the Court leaves to national courts to ascertain. The Court also held that national legislation which excludes from the betting and gaming sector operators in the form of companies whose shares are quoted on the regulated markets is likewise an obstacle to the freedom of establishment and the freedom to provide services, and stated that such an exclusion goes beyond what is necessary in order to achieve the objective of preventing operators active in the betting and gaming sector from being involved in criminal or fraudulent activities. Finally, those freedoms are also restricted by legislation which imposes a criminal penalty on persons for pursuing the organised activity of collecting bets without a licence or a police authorisation as required under the national legislation where those persons were unable to obtain licences or authorisations because that Member State, in breach of Community law, refused to grant licences or authorisations to such persons. Although in principle criminal legislation is a matter for which the Member States are responsible, Community law sets certain limits to their power, and such legislation may not restrict the fundamental freedoms guaranteed by Community law.

The next cases, namely *Schwarz and Gootjes-Schwarz, Commission v Germany* and Case [C-444/05 Stamatelaki](#) (judgment of 19 April 2007), concern payments for school fees or hospital treatment to an establishment in another Member State. *Schwarz and Gootjes-Schwarz* and *Commission v Germany* related to the tax relief granted to German taxpayers in respect of school fees paid for their children's attendance at private schools in Germany meeting certain conditions. This relief did not apply to fees paid to schools in other Member States. Before ruling on the compatibility of this legislation with Article 49 EC, the Court stated, first, that the concept of services extends to schools essentially financed by private funds. Since the aim of those establishments is to offer a service for remuneration, they can rely on the freedom to provide services. It is not necessary, however, for their financing to be provided by the pupils or their parents, as Article 50 EC does not require that the service be paid for by those for whom it is performed. On the other hand, schools which are not essentially financed by private funds, in particular schools forming part of a system of public education, are excluded from the definition of services, given that, by establishing and maintaining a system of public education, financed as a general rule by the public budget and not by pupils or their parents, the



State simply carries out its task in the social, cultural and educational fields towards its population. The Court stated, second, that where schools established outside Germany that are essentially financed by private funds wish to offer education to the children of German residents, the exclusion of those schools' fees from the benefit of the tax relief hinders their freedom to provide services and that, even though the freedom to provide services does not apply to schools established outside Germany which are not essentially financed from private funds, the tax relief nonetheless may not be refused in respect of those schools' fees. As has already been noted above, it is the freedom of movement of citizens of the Union which prevents such an exclusion. Accordingly, the Court held that Community law precludes the tax relief from being generally refused in respect of school fees paid to schools in other Member States. Finally, such legislation also impedes the freedom of establishment of employees and self-employed persons who have transferred their normal place of residence to, or who work in, Germany and whose children continue to attend a fee-paying school situated in another Member State. They do not enjoy the tax relief, whereas they would enjoy it if their children attended a school situated in Germany.

In *Stamatelaki*, the Court held that the freedom to provide services is impeded by national legislation which excludes all reimbursement by a national social security institution of the costs occasioned by treatment of persons insured with it in private hospitals in another Member State, except those relating to treatment provided to children under 14 years of age. Such a measure, whose absolute nature (except for the case of children under 14 years of age) is not appropriate to the objective pursued, cannot be justified by the risk of seriously undermining the financial balance of a social security system since measures which are less restrictive and more in keeping with the freedom to provide services could be adopted, such as a prior authorisation scheme which complies with the requirements imposed by Community law and, if appropriate, the determination of scales for reimbursement of the costs of treatment.

Finally, Case [C-341/05 *Laval un Partneri*](#) (judgment of 18 December 2007) and Case [C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union*](#) (judgment of 11 December 2007), relating to collective action engaged in by trade union organisations against a provider of services established or wishing to establish itself in another Member State, deserve particularly close attention. While in *The International Transport Workers' Federation and The Finnish Seamen's Union* a Finnish maritime transport company wished to establish itself in Estonia so as to register one of its vessels there, in order to be more competitive, in *Laval un Partneri* a Latvian construction company wished to exercise its freedom to provide services in Sweden, in particular by the posting of Latvian workers to one of its Swedish subsidiaries. In both cases, the companies in question had to negotiate with trade unions in relation to the companies' signing of, and compliance with, the collective agreements applicable to their respective sectors. In the former case, the trade union, affiliated to a federation of trade unions based in the United Kingdom, sought application of the Finnish collective agreement to the crew of the vessel which would be flying the Estonian flag. In the latter case, the trade union demanded that the Latvian company should, by way of guarantee as to the rate of pay, sign the Swedish collective agreement and apply it to its posted workers. Since negotiations were unsuccessful in each case, the trade unions exercised their right of collective action, in particular by use of the right to strike, to compel the companies to sign and implement the collective



agreements. Accordingly, the national courts essentially asked the Court whether collective action constitutes a restriction within the meaning of Articles 43 and 49 EC. The Court held that, although the right to take collective action must be recognised as a fundamental right that forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may nonetheless be subject to certain restrictions. Furthermore, in accordance with settled case-law, the exercise of fundamental rights does not fall outside the scope of the provisions of the Treaty, and must be reconciled with the requirements relating to rights protected under the Treaty and be in accordance with the principle of proportionality. Accordingly, such collective action initiated by a trade union or a group of trade unions against an undertaking in order to induce that undertaking to enter into an agreement, the terms of which are liable to deter it from exercising the freedom of establishment or freedom to provide services, constitutes a restriction on those freedoms. However, the Court made it clear that a restriction of that kind may, in principle, be justified by an overriding reason of public interest, such as the protection of the workers of the host State against possible social dumping, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.

On the other hand, the Court held in *Laval un Partneri* that national rules which fail to take into account, irrespective of their content, collective agreements to which undertakings that post workers to the host Member State are already bound in the Member State in which they are established give rise to discrimination against such undertakings, in so far as under those national rules they are treated in the same way as national undertakings which have not concluded a collective agreement.

Three judgments concerning the free movement of capital will be accorded particular attention, the first being the judgment of 23 October 2007 in Case [C-112/05](#) *Commission v Germany*, relating to the law known as the 'Volkswagen law'. The Court held that, by maintaining in force the provisions of this law which, in derogation from the general law, cap the voting rights of any Volkswagen shareholder at 20 % of the share capital, require a majority of more than 80 % of the share capital in order for certain resolutions of the general assembly of shareholders to be passed and confer upon the State and a regional authority the right to appoint two representatives each to the company's supervisory board, the Federal Republic of Germany had failed to fulfil its obligations under Article 56(1) EC. The Court stated that the fact that the threshold for a majority was set at more than 80 % of the share capital afforded any shareholder holding 20 % of the share capital a blocking minority and enabled both public authorities to procure for themselves the ability to oppose important resolutions on the basis of a lower level of investment than would be required under the general law. Furthermore, by capping voting rights at 20 %, the legislation helped to give those authorities the opportunity to exercise considerable influence. Those provisions therefore limited the possibility for other shareholders to participate in the company, to establish or maintain lasting and direct economic links with it and to participate effectively in its management or control. By diminishing the interest in acquiring a stake in the company's capital, those measures were liable to deter direct investors from other Member States and thus constituted a restriction on the free movement of capital. The same was true of the right, enjoyed by the public authorities alone, to appoint two representatives to the supervisory board. By enabling those authorities to participate in a more significant manner in the activity of the supervisory



board, this measure in fact allowed them to exercise an influence which exceeded their levels of investment and was greater than their status as shareholders would normally allow.

Second, Case [C-370/05 Festersen](#) [2007] ECR I-1129 should be noted, in which the Court held that Article 56 EC precludes national legislation from laying down as a condition for acquiring an agricultural property the requirement that the acquirer take up his fixed residence on that property for a period of eight years, irrespective of particular circumstances relating to individual characteristics of the agricultural land concerned. According to the Court, it can be accepted that national legislation containing such a residence requirement seeks to avoid the acquisition of agricultural land for purely speculative reasons and is likely to facilitate the preferential appropriation of that land by persons who wish to farm it. Such legislation therefore does pursue a public interest objective in a Member State in which agricultural land is a limited natural resource. However, the Court held the residence requirement to be a measure going beyond what is necessary to attain such an objective. First, it is particularly restrictive in that it limits not only the free movement of capital but also the right of the acquirer to choose his place of residence freely, which is guaranteed by the European Convention on Human Rights and protected under Community law, thereby adversely affecting a fundamental right. Second, there is nothing to support the conclusion that measures less restrictive than that requirement could not be adopted to achieve the objective sought. Such an obligation, particularly when coupled with a condition that residence be maintained for a number of years, therefore goes beyond that which could be regarded as necessary having regard to the public interest objective pursued.

Finally, in *Holböck* the Court applied Article 57(1) EC which lays down, for restrictions existing on 31 December 1993 that relate to the movement of capital involving direct investment, an exception to the prohibition of restrictions on the movement of capital between Member States and non-member countries. The Court noted first of all that the concept of direct investments concerns investments of any kind undertaken by natural or legal persons which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity. As regards shareholdings in undertakings, the objective of establishing or maintaining lasting economic links presupposes that the shares held by the shareholder enable him to participate effectively in the management of the company or in its control. The Court then stated that Article 57(1) EC also applies to national measures which restrict payments of dividends deriving from investments. Consequently, the Court held that a restriction on capital movements, such as a less favourable tax treatment of foreign-sourced dividends, comes within the scope of Article 57(1) EC, inasmuch as it relates to holdings acquired with a view to establishing or maintaining lasting and direct economic links between the shareholder and the company concerned and which allow the shareholder to participate effectively in the management of the company or in its control. Article 57(1) EC must therefore be interpreted as meaning that Article 56 EC is without prejudice to the application by a Member State of legislation which existed on 31 December 1993 under which a shareholder in receipt of dividends from a company established in a non-member country, who holds two thirds of the share capital in that company, is taxed at a rate higher than that imposed on a shareholder in receipt of dividends from a resident company.



The Court had many opportunities to consider the powers of direct taxation retained by the Member States and the limits on the exercise of those powers. It ruled on various national fiscal measures concerning, first, the taxation of companies and their shareholders and, second, the taxation of individuals. Some of these measures were held compatible, and others incompatible, with Community law.

With regard to the taxation of companies, first, a number of national measures were held entirely incompatible with the fundamental freedoms in the Treaty. Thus, the Court held in its judgment of 25 October 2007 in Case [C-464/05 Geurts and Vogten](#) that, in the absence of valid justification, Article 43 EC precludes inheritance tax legislation of a Member State which excludes from the exemption from that tax available for family undertakings those undertakings which employ in the three years preceding the date of death of the deceased at least five workers in another Member State, whereas it grants such an exemption where the workers are employed in a region of the first Member State. The Court considered that the condition requiring the employment of workers in the territory of the Member State can be fulfilled more easily by a company already established there and, consequently, that the legislation in question introduces indirect discrimination between taxpayers on the basis of the place of employment of a certain number of workers in a certain period. The Court then pointed out that, while such treatment might be justified by reasons relating to the survival of small and medium-sized undertakings and the need to maintain the effectiveness of fiscal supervision, the treatment must also be appropriate for achieving those objectives and not go beyond what is necessary to attain them. The Court stated that domestic and foreign family undertakings are in a comparable situation so far as concerns the objective that they should continue to operate and, furthermore, that the effectiveness of fiscal supervision can be maintained by requesting taxpayers to provide the evidence necessary for enjoyment of the tax benefit, instead of categorically refusing to grant it to companies not employing at least five workers in the Member State in question. Consequently, as the legislation in question does not enable the objective pursued to be achieved and is not proportionate, it is contrary to Article 43 EC.

In its judgment of 11 October 2007 in Case [C-451/05 Elisa](#), the Court held that Article 56 EC precludes legislation of a Member State which exempts companies established in that State from a tax on immovable property located in its territory, when, in respect of companies established in another Member State, it makes that exemption subject either to the existence of a bilateral convention on combating tax avoidance and tax evasion or to the existence of a requirement in a treaty containing a clause prohibiting discrimination on grounds of nationality to the effect that those companies cannot be more heavily taxed than resident companies. The Court considered that those additional conditions under the national legislation which non-resident companies must meet in order to be able to benefit from the tax exemption make investment in immovable property less attractive for those companies. The legislation therefore restricts the free movement of capital. The Court pointed out that, while the prevention of tax evasion is an overriding requirement of general interest capable of justifying a restriction on freedom of movement, the restriction must be appropriate to the objective pursued and must not go beyond what is necessary to attain that objective. Since the national legislation in the case in point did not allow non-resident companies to show that their objective was not that of tax evasion, the Court held that the Member State could have adopted less restrictive measures and that, consequently, the tax was not justified in light of the objective of combating tax evasion.



In Case [C-292/04 Meilicke and Others](#) [2007] ECR I-1835, the Court held that a Member State is not to limit the right to a tax credit to dividends of capital companies established in that State. Referring to its case-law clarifying the requirements arising from the principle of free movement of capital in relation to dividends received by residents from non-resident companies, and in particular to Case [C-35/98 Verkooijen](#) [2000] ECR I-4071 and Case [C-319/02 Manninen](#) [2004] ECR I-7477, the Court held that German tax legislation restricted the free movement of capital. It stated that the tax credit under the national legislation was designed to prevent the double taxation of companies' profits distributed in the form of dividends. It then observed that the legislation, by limiting the tax credit to dividends paid by companies established in Germany, disadvantaged persons who were fully taxable in Germany for income tax purposes and received dividends from companies established in other Member States. Such persons were not entitled to set off against their tax the corporation tax payable by those companies in their State of establishment. Furthermore, the legislation constituted for those companies an obstacle to the raising of capital in Germany. The Court rejected the argument that the legislation was justified by the need to safeguard the cohesion of the national tax system. It observed that it would be sufficient, and would not threaten the cohesion of the national tax system, to grant to a taxpayer holding shares in a company established in another Member State a tax credit calculated by reference to the corporation tax payable by that company in that latter Member State. Such a solution would constitute a measure less restrictive of the free movement of capital. Finally, the Court held that it was not appropriate to limit the temporal effects of its judgment, having first pointed out, in particular, that the requirements arising from the principle of free movement of capital in relation to dividends received by residents from non-resident companies had already been clarified in *Verkooijen* and that the temporal effects of that judgment had not been limited.

Also, certain measures were declared partly incompatible with the fundamental freedoms in the Treaty, or incompatible subject to a review of proportionality with regard to the legitimate objective pursued. In this connection, Case [C-345/04 Centro Equestro da Lezíria Grande](#) [2007] ECR I-1425 will be considered first. A company had given a number of artistic presentations in a Member State where it was not resident and had been taxed, by deduction at source, on the income received in that Member State. Since the company was not established in that Member State and was therefore subject to limited tax liability, it was entitled to a refund of the tax deducted, subject to the condition that the operating expenses or business costs having a direct economic connection to the taxed income were greater than half of that income. The Court held that Article 59 of the EC Treaty (now, after amendment, Article 49 EC) does not preclude such national legislation in so far as it makes repayment of corporation tax deducted at source on the income of a taxpayer with restricted tax liability subject to the condition that the operating expenses in respect of which a deduction is claimed for that purpose by that taxpayer have a direct economic connection to the income received from activities pursued in the Member State concerned, on condition that all the costs that are inextricably linked to that activity are considered to have such a direct connection, irrespective of the place and time at which those costs were incurred. By contrast, that article precludes such national legislation in so far as it makes repayment of that tax to the taxpayer subject to the condition that the operating expenses exceed half of the income.



Test Claimants in the Thin Cap Group Litigation concerned legislation of a Member State which restricts the ability of a resident company to deduct, for tax purposes, interest on loan finance granted by a direct or indirect parent company which is resident in another Member State or by a company which is resident in another Member State and is controlled by such a parent company, but does not impose that restriction on loan finance granted by a company which is also resident. After finding that the difference in treatment thereby introduced between resident subsidiaries which is based on the place where their parent company has its seat makes it less attractive for companies established in other Member States to exercise freedom of establishment, the Court pointed out that a national measure restricting freedom of establishment may nevertheless be justified where it specifically targets wholly artificial arrangements which do not reflect economic reality and are designed to circumvent a Member State's legislation. According to the Court, this type of conduct is such as to undermine the right of the Member States to exercise their tax jurisdiction in relation to the activities carried out in their territory and thus to jeopardise a balanced allocation between Member States of the power to impose taxes. The Court then held that, by preventing the practice of thin capitalisation, legislation of the kind in question is appropriate for attaining that objective, but it did not rule on whether the measure at issue is in fact proportionate, referring this matter to the national court. It stated, however, that the national legislation must be considered proportionate if, first, the taxpayer is able to produce, if appropriate and without being subject to undue administrative constraints, evidence as to the commercial justification for the transaction in question, thus enabling consideration of objective and verifiable elements for the purpose of identifying the existence of a purely artificial arrangement entered into for tax reasons alone and, second, the reclassification of interest as a distribution is limited to the proportion of the interest that exceeds what would have been agreed on an arm's-length basis.

Finally, certain national measures, although treating comparable situations differently, were declared compatible with Community law because they were justified by overriding reasons in the public interest. Thus, the judgment of 18 July 2007 in Case [C-231/05 Oy AA](#), which follows the line of case-law in *Test Claimants in the Thin Cap Group Litigation*, is worthy of note in that it upholds arguments in justification based on the risk of tax avoidance. The case concerned legislation of a Member State whereby a subsidiary established in that Member State could deduct from its taxable income an intra-group financial transfer in favour of its parent company only if the latter was established in that same Member State. After observing that such legislation introduces a difference in treatment between subsidiaries established in the same Member State according to whether or not their parent company has its corporate seat in that State, a difference which restricts the freedom of establishment, the Court held that the restriction was justified by the need to safeguard the balanced allocation of the power to tax between the Member States in combination with the need to prevent tax avoidance. Taken together, these considerations constitute legitimate objectives compatible with the EC Treaty and justified by overriding reasons in the public interest. According to the Court, to accept that an intra-group cross-border transfer could be deducted would allow groups of companies to choose freely the Member State in which the profits of the subsidiary are to be taxed, by removing them from the basis of assessment of the latter and, where that transfer is regarded as taxable income in the Member State of the parent company transferee, incorporating them in the basis of assessment of the parent company; this would



undermine the system of the allocation of the power to tax between Member States. Furthermore, the possibility of transferring the taxable income of a subsidiary to a parent company with its establishment in another Member State carries the risk that, by means of purely artificial arrangements, income transfers may be organised within a group of companies towards companies in Member States applying the lowest rates of taxation. Finally, the Court held that, even if such legislation is not specifically designed to exclude purely artificial arrangements from the tax advantage it confers, it may be regarded as proportionate to the above objectives, taken as a whole, since extending the tax advantage to cross-border situations would allow groups of companies to choose freely the Member State in which their profits are to be taxed, to the detriment of the right of the Member State where the subsidiary is located to tax profits generated by activities carried out on its territory.

In the field of taxation of individuals, a number of national measures were declared incompatible with the fundamental freedoms in the Treaty because they treated identical situations differently, without valid justification. Thus, in Case [C-329/05 Meindl](#) [2007] ECR I-1113 the Court ruled that a resident taxpayer cannot be refused, by the Member State of his residence, joint assessment of income tax with his spouse from whom he is not separated and who lives in another Member State on the ground that that spouse received in that Member State both more than 10 % of the household's income and more than a certain ceiling, where the income received by that spouse in the second Member State is not subject there to income tax. Such a taxpayer is treated differently although he is objectively in the same situation as a resident taxpayer whose spouse is resident in the same Member State and receives there only income not subject to tax. The Court also found that the State of residence of such a taxpayer is the only State which can take account of the taxpayer's personal and family circumstances, since he is not only resident in that State but, additionally, receives the entire taxable income of the household there. Thus, in the absence of justification, the fact that that taxpayer is not in any way entitled, in connection with joint assessment, to have his personal and family circumstances taken into account, but on the contrary is subject to the tax applicable to unmarried persons, despite being married, constitutes discrimination prohibited by the principle of freedom of establishment.

The judgment in Case [C-383/05 Talotta](#) [2007] ECR I-2555 provides a further example of a decision declaring a measure relating to income tax incompatible with the EC Treaty because it treats differently resident and non-resident taxpayers who are in objectively comparable situations. The legislation in question provided that, in the absence of evidence, the taxable non-employment income of a resident taxpayer was established by means of a comparison with that of other taxpayers, whereas that of a non-resident taxpayer was determined by reference to a minimum tax base. The Court held that such a difference in treatment constitutes indirect discrimination on grounds of nationality, contrary to the freedom of establishment, since, first, the income received by a resident taxpayer and by a non-resident taxpayer in the context of a self-employed activity in the territory of the Member State concerned are in the same category of income, that is to say, income arising from self-employed activity carried out in the territory of the Member State and, second, that treatment is liable to operate mainly to the detriment of nationals of other Member States, since non-residents are in the majority of cases foreign nationals. The fact that the use of minimum tax bases may often be favourable to non-resident



taxpayers is immaterial in this regard. The Court then explained that, while the need to ensure the effectiveness of fiscal supervision constitutes an overriding reason in the public interest, it cannot justify this indirect discrimination, since the same practical difficulties exist for the fiscal supervision of residents and there are other mechanisms enabling the exchange of tax-related information between Member States.

Finally, in Case [C-150/04](#) *Commission v Denmark* [2007] ECR I-1169 the Court upheld an application for failure to fulfil obligations brought by the Commission against the Kingdom of Denmark, declaring that Articles 39 EC, 43 EC and 49 EC were infringed by legislation permitting taxpayers to deduct or exclude from their taxable income contributions paid to pension schemes in so far as the pension contract was concluded with an institution established on national territory, while excluding any tax advantage for contracts entered into with pension institutions established in other Member States. The Court found that such legislation was liable to deter the freedom of pension institutions in other Member States to provide assurance services and also the freedom of establishment and freedom of movement of workers who originated from or who had worked in another Member State and had already entered into a contract in respect of a pension scheme there. The Court rejected the arguments relating to the need to maintain effective fiscal supervision and to prevent tax avoidance, holding that less restrictive means of achieving those two objectives existed. Nor was a justification relating to the cohesion of the tax system upheld, in the absence of proof of a direct link requiring preservation between a tax advantage and a corresponding disadvantage. The factor liable adversely to affect that cohesion was to be found in the transfer of the residence of the taxpayer between the time of payment of contributions and that of payment of the corresponding benefits, and less in the fact that the pension institution concerned was in another Member State.

Visas, asylum and immigration

In Case [C-77/05](#) *United Kingdom v Council* and Case [C-137/05](#) *United Kingdom v Council* (judgments of 18 December 2007), the Court had to interpret the Schengen Protocol ⁽¹⁸⁾ in relation to the adoption of Regulations No 2007/2004 ⁽¹⁹⁾ and No 2252/2004 ⁽²⁰⁾. The United Kingdom of Great Britain and Northern Ireland, which had been excluded by the Council from participating in the adoption of those regulations, sought their annulment, arguing that its exclusion infringed the Schengen Protocol.

The Court held that the Schengen Protocol had been applied correctly and that Article 5(1) of the protocol must be interpreted as meaning that the participation of a Member State in the adoption of a measure pursuant to that article is conceivable only to the extent that that State has been authorised by the Council to accept the area of the Schengen

⁽¹⁸⁾ Protocol integrating the Schengen *acquis* into the framework of the European Union, annexed to the EU Treaty and the EC Treaty by the Treaty of Amsterdam.

⁽¹⁹⁾ Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ 2004 L 349, p. 1).

⁽²⁰⁾ Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States (OJ 2004 L 385, p. 1).



acquis which is the context of the measure or of which it is a development, which was not the position in the case in point. According to the Court's reasoning, the interpretation put forward by the United Kingdom would have the consequence of depriving Article 4 of the Schengen Protocol of all effectiveness, in that Ireland and the United Kingdom could then take part in all proposals and initiatives to build upon the Schengen *acquis* under Article 5(1) of the protocol even though they had not accepted the relevant provisions of that *acquis* or had not been authorised to take part in them.

Competition rules

In the sphere of competition there are three judgments to which particular attention will be paid. First to be noted is Case [C-280/06 *Autorità garante della Concorrenza e del Mercato*](#) (judgment of 11 December 2007), concerning the criteria for attribution of liability for infringement of the competition rules where one undertaking succeeds another and both are subject to the control of the same public authority. In that judgment, the Court first of all observed that when an entity infringes competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement. When the entity having committed an infringement of the competition rules is subject to a legal or organisational change, this change does not necessarily create a new undertaking free of liability for the conduct of its predecessor that infringed the competition rules if, from an economic point of view, the two are identical. The Court made it clear that where two entities constitute one economic entity, the fact that the entity having committed the infringement still exists does not as such preclude the imposition of a penalty on the entity to which its economic activities were transferred. Last, the Court emphasised that applying penalties in this way is permissible, particularly where those entities have been subject to control by the same person and have, given the close economic and organisational links between them, carried out, in all material respects, the same commercial instructions. The Court therefore held that in the case of entities answering to the same public authority, where conduct amounting to one and the same infringement of the competition rules was adopted by one entity and subsequently continued until it ceased by another entity which succeeded the first, which has not ceased to exist, that second entity may be penalised for that infringement in its entirety if it is established that those two entities were subject to the control of the said authority.

Second, attention will be given to Case [C-95/04 P *British Airways v Commission*](#) [2007] ECR I-2331 in which the Court explained the system of bonuses and discounts granted by an undertaking in a dominant position. The Court held that, in determining whether, in the case of an undertaking in a dominant position, a system of discounts or bonuses which constitute neither quantity discounts or bonuses nor fidelity discounts or bonuses, constitutes an abuse, it is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of those discounts or bonuses. It first has to be determined whether those discounts or bonuses can produce an exclusionary effect, that is to say, whether they are capable, firstly, of making market entry very difficult or impossible for competitors of the undertaking in a dominant position and, secondly, of making it more difficult or impossible for its co-contractors to choose between various sources of supply or commercial partners. It then needs to be examined whether there is an objective economic justification for the discounts and bonuses granted. In addition, the Court



specified the conditions for applying the prohibition of discrimination laid down in subparagraph (c) of the second paragraph of Article 82 EC to the bonuses and discounts granted by an undertaking in a dominant position, stressing that it must be found not only that the behaviour of that undertaking on a market is discriminatory, but also that it tends to distort the competitive relationship between the co-contractors.

Lastly, in Case [C-202/06 P](#) *Cementbouw Handel & Industrie v Commission* (judgment of 18 December 2007), the Court examined the effect of commitments proposed by the parties on the Commission's competence in relation to concentrations. The Court noted that Regulation No 4064/89 ⁽²¹⁾ on the control of concentrations is based on the principle of a clear division of powers between the national and Community supervisory authorities. That division reflects, in particular, a concern for legal certainty, which means that it must be possible to identify in a foreseeable manner the authority competent to examine a given concentration. For that reason, the Community legislature has laid down criteria that are both precise and objective allowing the determination of whether a concentration has the economic size necessary for it to have a 'Community dimension' and, accordingly, to fall within the exclusive competence of the Commission. In addition, the need for speed, which characterises the general scheme of Regulation No 4064/89 and which requires the Commission to comply with strict time limits for the adoption of the final decision, means that the Commission's competence cannot be challenged at any time or be in a state of constant flux. The Court held, therefore, that while the Commission loses its competence to examine a concentration where the undertakings concerned completely abandon the proposed concentration, the position is otherwise where the parties do no more than propose partial amendments. Proposals of that kind could not have the effect of requiring the Commission to re-examine its competence without allowing the undertakings concerned significantly to disturb the course of the proceedings and the effectiveness of the control which the legislature sought to put in place. The commitments proposed or adopted by undertakings are therefore so many matters which the Commission must take into account in its examination of the substantive question, that is to say, that of the compatibility or incompatibility of the concentration with the common market, but they cannot strip the Commission of its competence, since that is a matter which will have been determined in the first phase of the proceedings. It follows that the competence of the Commission to make findings in relation to a concentration must be established, as regards the whole of the proceedings, at a fixed time, which must necessarily be closely related to the notification of the concentration.

Taxation

In this sphere, three cases relating to value added tax ('VAT') call for particular attention.

In Case [C-284/04](#) *T-Mobile Austria and Others* (judgment of 26 June 2007) and Case [C-369/04](#) *Hutchison 3G and Others* (judgment of 26 June 2007), the Court had occasion to define the ambit of the term 'economic activities' within the meaning of Article 4(2) of the Sixth

⁽²¹⁾ Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 180, p. 1), as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1).



Directive 77/388⁽²²⁾. Those two cases concerned the allocation, by auction by the national regulatory authority responsible for spectrum assignment, of rights such as rights to use frequencies in the electromagnetic spectrum, with the aim of providing the public with mobile telecommunications services. The Court considered that the grant of such rights must be regarded as a necessary precondition for access to the mobile telecommunications market, and not as participation in that market by the competent national authority. Only the operators, who are the holders of the rights granted, operate on the market by exploiting the property in question for the purpose of obtaining income therefrom on a continuing basis, which the competent authorities do not. The fact that the grant of the frequency use rights at issue gives rise to the payment of fees cannot alter that reasoning. In consequence, such a grant does not constitute an economic activity within the meaning of Article 4(2) and does not, therefore, fall within the scope of Directive 77/388.

In Case [C-73/06 *Planzer Luxembourg*](#) (judgment of 28 June 2007), the Court considered the conditions and detailed rules for refund of VAT such as those laid down by the Eighth Directive 79/1072⁽²³⁾ and by Thirteenth Directive 86/560⁽²⁴⁾. This case arose from the refusal of the tax authorities of one Member State to refund to a taxable person having its registered office in another Member State the VAT paid by that person on goods acquired in the first Member State for its taxable transactions, on the ground that there were doubts concerning the actual place from which the business of the taxable person concerned was managed — in the Member State of its registered office or from the parent company established outside Community territory — even though the administration of the Member State of the taxable person's registered office had issued a certificate concerning that person's liability to VAT in that State. First of all, the Court confirmed that a certificate in accordance with the model in Annex B to the Eighth Directive does, as a rule, allow the presumption not only that the person concerned is subject to VAT in the Member State of issue, but also that he is established in that State in one way or another, which as a rule binds in fact and law the authorities of the Member State in which refund is sought. Nevertheless, where they have doubts as to the economic reality of the establishment whose address is given in the certificate issued, the authorities concerned may satisfy themselves of that reality by having recourse to the administrative measures made available for that purpose by Community legislation and, if necessary, refuse the refund applied for by the taxable person, without prejudice to any possible legal action by the latter. The Court then went on to state that a company's place of business for the purposes of Article 1(1) of the Thirteenth Directive is the place where the essential decisions concerning its general management are taken and where the functions of its central administration are exercised. Determination of that place is based on a series of factors, foremost amongst which are its registered office, the place of its central administration, the place where its directors meet and the place, usually identical, where the general policy

⁽²²⁾ Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

⁽²³⁾ Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonisation of the laws of the Member States relating to turnover taxes — Arrangements for the refund of value added tax to taxable persons not established in the territory of the country (OJ 1979 L 331, p. 11).

⁽²⁴⁾ Thirteenth Council Directive 86/560/EEC of 17 November 1986 on the harmonisation of the laws of the Member States relating to turnover taxes — Arrangements for the refund of value added tax to taxable persons not established in Community territory (OJ 1986 L 326, p. 40).



of that company is determined. Other factors, such as the place of residence of the main directors, the place where general meetings are held, the place where administrative and accounting documents are kept, and the place where the company's financial, and particularly banking, transactions mainly take place, may also need to be taken into account. So, a fictitious presence, such as that of a 'letter-box' or 'brass-plate' company, cannot be described as a place of business for the purposes of Article 1(1) of the Thirteenth Directive.

Approximation and harmonisation of laws

As in the past, this field has yielded copious decisions, certain among which call for particular mention.

In Case [C-470/03](#) *AGM-COS.MET* (judgment of 17 April 2007), the question before the Court was whether the conduct of an official who, in public statements, warned against the unreliability of certain vehicle lifts, could be attributed to the State. The Court ruled that an official's statements which, by reason of their form and circumstances, give the persons to whom they are addressed the impression that they are official positions taken by the State, not personal opinions of the official, are attributable to the State. The decisive factor is whether the persons to whom those statements are addressed can reasonably suppose, in the given context, that they are positions taken by the official with the authority of his office. In this case, statements by an official describing machinery certified as conforming to Directive 98/37 ⁽²⁵⁾ as contrary to the relevant harmonised standard and dangerous are capable of hindering, at least indirectly and potentially, the placing on the market of such machinery and cannot be justified either on the basis of the objective of protection of health or on the basis of the freedom of expression of officials. Article 4(1) of Directive 98/37 must be interpreted as meaning that, first, it confers rights on individuals and, second, it leaves the Member States no discretion in this case as regards machinery that complies with the directive or is presumed to do so. Failure to comply with that provision as a result of statements made by an official, assuming that they are attributable to the Member State, constitutes a sufficiently serious breach of Community law for the Member State to incur liability.

Case [C-305/05](#) *Ordre des barreaux francophones et germanophone and Others* (judgment of 26 June 2007) raised the question whether the imposition on lawyers of obligations of information and of cooperation with the authorities responsible for combating money laundering, laid down in Article 6(1) of Directive 91/308 ⁽²⁶⁾, when they act in certain transactions of a financial nature not linked to judicial proceedings, infringes the right to a fair trial.

The Court ruled that there was, in those circumstances, no breach of the right to a fair trial, recalling first that the obligations of information and cooperation apply to lawyers only in so far as they advise their client in the preparation or execution of certain transactions,

⁽²⁵⁾ Directive 98/37/EC of the European Parliament and of the Council of 22 June 1998 on the approximation of the laws of the Member States relating to machinery (OJ 1998 L 207, p. 1).

⁽²⁶⁾ Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ 1991 L 166, p. 77).



essentially of a financial nature or concerning real estate, or when they act for and on behalf of their client in any financial or real estate transaction. As a general rule, the nature of such activities is such that they take place in a context with no link to judicial proceedings and, consequently, outside the scope of the right to a fair trial.

As soon as a lawyer is called upon for assistance in defending or representing a client before the courts, or for advice as to the manner of instituting or avoiding judicial proceedings, that lawyer is exempt from the obligations of information and cooperation, regardless of whether the information has been received or obtained before, during or after the proceedings. An exemption of that kind safeguards the client's right to a fair trial.

In Joined Cases [C-439/05 P](#) and [C-454/05 P](#) *Land Oberösterreich v Commission* (judgment of 13 September 2007), the Commission had rejected the Republic of Austria's request for derogation from harmonisation measures, notified to it on the basis of Article 95(5) EC, and concerning a draft law seeking a derogation from the provisions of Directive 2001/18 ⁽²⁷⁾ by prohibiting genetically modified organisms in the *Land Oberösterreich*. In support of their appeal, when the Court of First Instance had dismissed the application for annulment of the Commission's decision, the appellants argued, first, infringement of the right to be heard and, second, infringement of Article 95(5) EC.

It is not apparent from the wording of that article that the Commission is required to hear the notifying Member State before it takes its decision to approve or reject the national provisions in question. The Community legislature merely laid down the conditions to be fulfilled in order to obtain a Commission decision, the period within which the Commission must issue its decision to approve or reject and possible extensions to that period.

The procedure is initiated not by a Community institution or a national body but by a Member State, the Commission's decision being taken only in response to that initiative. In its request, the Member State is at liberty to comment on the national provisions it asks to have adopted, as is quite clear from Article 95(5) EC, which requires the Member State to state the grounds on which its request is based.

Further, the Court stated that the introduction of provisions of national law derogating from a harmonisation measure must be based on new scientific evidence relating to the protection of the environment or of the working environment, made necessary by reason of a problem specific to the Member State concerned arising after the adoption of the harmonisation measure, and that the proposed provisions as well as the grounds for introducing them must be notified to the Commission.

In Case [C-429/05](#) *Rampion and Godard* (judgment of 4 October 2007), concerning the protection of consumers in the sphere of consumer credit and the consumer's right to

⁽²⁷⁾ Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC (OJ 2001 L 106, p. 1).



pursue remedies against the lender, the Court held that Directive 87/102 ⁽²⁸⁾ applies both to credit designed to finance a single transaction and to a credit facility allowing the consumer to use the credit granted on a number of occasions. Moreover, the Court decided that on a proper construction of Articles 11 and 14 it is contrary to those provisions for the right to pursue remedies, provided for in Article 11(2) of that directive and which the consumer enjoys against the grantor of credit, to be made subject to the condition that the prior offer of credit should indicate the goods or services financed.

In Case [C-457/05 *Schutzverband der Spirituosen-Industrie*](#) (judgment of 4 October 2007), the Court held that, having regard to the general scheme and purpose of Directive 75/106 ⁽²⁹⁾ and the principle of the free movement of goods guaranteed by Article 28 EC, it is contrary to that provision for a Member State to prohibit the marketing of pre-packages with a nominal volume of 0.071 litre, not included in the Community range but lawfully manufactured and marketed in another Member State, unless such a prohibition is justified by an overriding requirement, applies without distinction to national and imported products alike, is necessary in order to meet the requirement in question and is proportionate to the objective pursued, and that objective cannot be achieved by measures which are less restrictive of intra-Community trade.

Once again the several directives relating to the award of public procurement contracts have given rise to proceedings.

Case [C-295/05 *Asociación Nacional de Empresas Forestales*](#) (judgment of 19 April 2007) dealt with the question whether a Member State might confer on a public undertaking a legal regime enabling it to carry out operations without being subject to Directives 92/50 ⁽³⁰⁾, 93/36 ⁽³¹⁾ and 93/37 ⁽³²⁾ on the award of public procurement contracts. The particular public undertaking in question enjoys a special status enabling it to carry out a large number of works at the direct demand of the administration, it being a technical service of the administration, so bypassing the award procedures laid down by law, and it has no choice, either as to the acceptance of a demand made by the competent authorities in question, or as to the tariff for its services. The Court ruled that those directives do not preclude a body of legal rules such as that governing that public undertaking which enable the latter, as a public undertaking acting as an instrument and technical service of several public authorities, to execute operations without being subject to the regime laid down by those directives, since, first, the public authorities concerned exercise over that undertaking a control similar to that which they exercise

⁽²⁸⁾ Council Directive 87/102/EEC of 22 December 1986 on the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ 1987 L 42, p. 48).

⁽²⁹⁾ Council Directive 75/106/EEC of 19 December 1974 on the approximation of the laws of the Member States relating to the making-up by volume of certain prepackaged liquids (OJ 1974 L 42, p. 1).

⁽³⁰⁾ Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

⁽³¹⁾ Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

⁽³²⁾ Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54).



over their own departments, and, second, such an undertaking carries out the essential part of its activities with those same authorities.

In Case [C-503/04](#) *Commission v Germany* (judgment of 18 July 2007), concerning a contract for waste disposal concluded by the City of Brunswick without following the tendering procedure at Community level and in consequence of the Federal Republic of Germany's failure to comply with a judgment finding that failure to fulfil obligations pursuant to Article 226 EC, the Court ruled that, while the second subparagraph of Article 2(6) of Directive 89/665 ⁽³³⁾ permits the Member States to preserve the effects of contracts concluded in breach of directives relating to the award of public contracts and thus protects the legitimate expectations of the parties thereto, its effect cannot be, unless the scope of the EC Treaty provisions establishing the internal market is to be reduced, that the contracting authority's conduct vis-à-vis third parties is to be regarded as in conformity with Community law following the conclusion of such contracts. Moreover, that provision relates, as is apparent from its wording, to the compensation which a person harmed by an infringement committed by a contracting authority may obtain from the latter and cannot be regarded also as regulating the relations between a Member State and the Community in the context of Articles 226 EC and 228 EC. Even if it were to be accepted that the principles of legal certainty and of the protection of legitimate expectations, the principle *pacta sunt servanda* and the right to property could be used against the contracting authority by the other party to the contract in the event of rescission, Member States cannot in any event rely thereon to justify the failure to comply with a judgment establishing a failure to fulfil obligations under Article 226 EC and thereby evade their own liability under Community law.

Case [C-337/06](#) *Bayerischer Rundfunk and Others* (judgment of 13 December 2007) dealt with the question whether the German public broadcasting bodies are contracting authorities for the purposes of application of the Community rules on the award of public contracts. Article 1 of Directive 92/50 regards as contracting authorities, inter alia, bodies governed by public law and financed, for the most part, by the State. The Court ruled that there is 'financing, for the most part, by the State' when the activities of public broadcasting bodies such as those at issue in the main proceedings are financed for the most part by a fee payable by persons who possess a receiver, which is imposed, calculated and levied in accordance with the rights and powers of public authority. When the activities of those public broadcasting bodies are financed according to the procedures referred to above, the condition of 'financing ... by the State' does not require there to be direct interference by the State or by other public authorities in the awarding, by such bodies, of a contract for the provision of cleaning services. The Court states that only the public contracts having the subject matter specified in Article 1 of the directive, that is to say, procurement contracts which fall within the essential function of broadcasting bodies, namely the creation and production of programmes, are excluded from the scope of that directive. On the other hand, the Community rules apply in full to public contracts for services which have no connection to the activities which form part of the performance of the public-service duties.

⁽³³⁾ Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).



Trade marks

In this field the Court examined both the regulation establishing the Community trade mark ⁽³⁴⁾ and the directive approximating national laws ⁽³⁵⁾.

The judgment given in Case [C-29/05 P *OHIM v Kaul*](#) [2007] ECR I-2213 clarified the conditions in which account may be taken of new facts and evidence when they are submitted in support of an appeal in opposition proceedings. The Court more particularly held that the Board of Appeal of the Office for Harmonization in the Internal Market enjoys discretion for the purposes of deciding, subject to supplying reasons, whether or not to take into account, in order to make the decision which it is called upon to give, facts and evidence adduced by the opponent for the first time in the written pleading lodged in support of its appeal, with the result that, on the one hand, the Board is not necessarily bound to take into consideration such facts and evidence and, on the other, their being taken into consideration cannot automatically be excluded. Article 59 of Regulation No 40/94, which lays down the conditions for bringing an appeal before a Board of Appeal, cannot therefore be interpreted as starting a new period for the person bringing such an appeal in which to submit facts and evidence in support of its opposition.

In Case [C-321/03 *Dyson*](#) [2007] ECR I-687 the Court, considering what signs may constitute a trade mark, held that the subject matter of an application for registration of a trade mark, which covers all the conceivable shapes of a transparent bin or collection chamber forming part of the external surface of a vacuum cleaner, is not a 'sign' within the meaning of Article 2 of Directive 89/104 and is not therefore capable of constituting a trade mark within the meaning of that provision. The subject matter of such an application which is, in actual fact, a mere property of the product concerned is capable of taking on a multitude of different appearances and is thus not specific. Given the exclusivity inherent in trade mark rights, the holder of a trade mark relating to such a non-specific subject matter would obtain an unfair competitive advantage, contrary to the purpose pursued by Article 2 of the directive, since it would be entitled to prevent its competitors from marketing vacuum cleaners having any kind of transparent collecting bin on their external surface, irrespective of its shape.

In Case [C-49/05 *Adam Opel*](#) [2007] ECR I-1017, the Court observed that, by virtue of Article 5(1) of First Directive 89/104, a registered trade mark confers on its proprietor the exclusive right to prevent all third parties not having his consent from using in the course of trade any sign which is identical with the trade mark in relation to goods which are identical with those for which the trade mark is registered. That enables the trade mark proprietor to protect his specific interests, that is to say, to ensure that the trade mark may fulfil its essential functions, in particular that of guaranteeing to consumers the origin of the goods. Therefore, the affixing by a third party, without authorisation from the trade mark proprietor, of a sign identical to that trade mark on scale models of vehicles bearing that trade mark, in order faithfully to reproduce those vehicles, and the marketing of those scale models, cannot be prohibited unless it affects or is liable to affect the functions of

⁽³⁴⁾ Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

⁽³⁵⁾ First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1).



that trade mark as a mark registered in respect of toys. As regards the consequences to be drawn from the fact that, first, the Opel logo is also registered for motor vehicles and, second, the mark appears to have a reputation in Germany for that kind of product, the Court pointed out that the trade mark proprietor is entitled to prevent use which, without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark as a trade mark registered for motor vehicles.

A decision in the same line of thought was taken in Case [C-17/06 Celine](#) (judgment of 11 September 2007), with regard to the use of a company name, trade name or shop name identical to an earlier mark in connection with the marketing of goods which are identical to those in relation to which that mark was registered. The Court went on to hold that, by virtue of Article 6(1)(a) of Directive 89/104, the right conferred by the trade mark does not entitle the proprietor to prevent a third party from using his own name or address in the course of trade, provided always that that third party uses it in accordance with honest practices in industrial or commercial matters.

In Case [C-246/05 Häupl](#) (judgment of 14 June 2007), the Court found it necessary to interpret Articles 10(1) and 12(1) of First Directive 89/104. On being asked to ascertain on what date the registration procedure is to be regarded as completed, that date marking the start of the period of use, the Court ruled that that directive does not determine in an unambiguous manner the beginning of the period of protection, the wording therefore making it possible to adapt that period to the specific features of national procedures. As a result, the 'date of the completion of the registration procedure' within the meaning of Article 10(1) of the directive must be determined in each Member State in accordance with the procedural rules on registration in force in that State. Specifically, that provision defines the start of the period of five years during which the mark must begin to be put to genuine use, save where there exist proper reasons. In this respect, the Court held that, pursuant to Article 12(1) of the directive, obstacles having a direct relationship with a trade mark which make its use impossible or unreasonable and which are independent of the will of the proprietor of that mark constitute 'proper reasons for non-use' of the mark. It is for the national court or tribunal to assess the relevant facts in the main proceedings and to determine whether they render the use of that mark unreasonable.

Economic and monetary policy

In Case [C-359/05 Estager](#) [2007] ECR I-581, the Court ruled that it is contrary to Regulations No 1103/97 and No 974/98 on the introduction of the euro ⁽³⁶⁾ for national legislation to raise the amount of a tax when effecting its conversion into euro, unless such an increase meets the requirements of legal certainty and transparency, thus enabling protection of the confidence of economic agents in the introduction of the euro. This means that the national legislation at issue must make it possible to distinguish clearly the decision of the authorities of the Member State to increase the amount of the tax from the process of conversion of that amount into euro.

⁽³⁶⁾ Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ 1997 L 162, p. 1). Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro (OJ 1998 L 139, p. 1).



Social policy

Among the Court's judgments given in the field of social policy, some cases may be noted that deal with the implementation of the principle of equal treatment and the sphere of workers' rights and their protection.

In respect of the rules of Community law governing equal treatment for men and women as regards employment and working conditions, the Court first of all defined the legal status of pregnant workers in the context of questions referred for a preliminary ruling on the interpretation of certain provisions of Directives 76/207⁽³⁷⁾ and 92/85⁽³⁸⁾. So, in Case [C-116/06 *Kiiski*](#) (judgment of 20 September 2007), the Court stated that national provisions governing childcare leave which, in so far as they fail to take into account changes affecting the worker concerned as a result of pregnancy during the period of at least 14 weeks preceding and after childbirth, do not allow the person concerned to obtain at her request an alteration of the period of her childcare leave at the time when she claims her rights to maternity leave and thus deprive her of the rights attaching to that maternity leave, are contrary to those provisions of Community law. In Case [C-460/06 *Paquay*](#) (judgment of 11 October 2007) the Court held, moreover, that Directive 92/85 prohibits the notification of a decision to dismiss on the grounds of pregnancy and/or of the birth of a child during the period of protection set down in Article 10(1) of that directive and also the taking of preparatory steps for such a decision before the end of that period. Having established that such a decision is contrary both to Articles 2(1) and 5(1) of Directive 76/207, whenever it may be notified, and even if it is notified after the end of the period of protection set down in Article 10 of Directive 92/85, and to Article 10 of Directive 92/85, the Court concluded that the measure chosen by a Member State under Article 6 of Directive 76/207 to sanction the infringement of those provisions must be at least equivalent to the sanction set down in national law implementing Articles 10 and 12 of Directive 92/85.

The Court also developed its case-law relating to the implementation of the principle of equal treatment for men and women in the sphere of pension schemes. Concerning Community pensions, the Court held, in particular, that the use of factors which vary according to sex in order to calculate the number of additional years of pensionable service to be credited in the case of transfer into the Community scheme of pension rights acquired by an official in respect of activity before entering the service of the Communities amounts to discrimination on grounds of sex, not justified by the need to ensure sound financial management of the pension scheme (judgment of 11 September 2007 in Case [C-227/04 P *Lindorfer v Council*](#)). With regard to equal treatment for men and women in the field of social security, the Court considered that the adoption of rules intended to allow persons of a particular sex, originally discriminated against, to become eligible throughout their retirement for the pension scheme applicable to persons of the other sex on payment of adjustment contributions representing the difference between the contributions paid by

⁽³⁷⁾ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

⁽³⁸⁾ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (OJ 1992 L 348, p. 1).



the persons originally discriminated against in the period during which the discrimination took place and the higher contributions paid by the other category of persons during the same period, together with interest to compensate for inflation, is not contrary to Directive 79/7⁽³⁹⁾. In addition, that payment cannot be required to be made as a single sum, where that condition makes the adjustment concerned impossible or excessively difficult (judgment of 21 June 2007 in Joined Cases [C-231/06](#) to [C-233/06](#) *Jonkman*). The Court also observed that where a judgment given by the Court on an order for reference makes it apparent that a provision of national law is incompatible with Community law, the national authorities are bound to take the measures necessary to ensure that Community law is observed, by ensuring in particular that national law is changed so as to comply with Community law as soon as possible and that the rights which individuals derive from Community law are given full effect. Where discrimination infringing Community law has been found, for as long as measures reinstating equal treatment have not been adopted, the national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the other category.

Furthermore, the principle of equal pay for male and female workers arose in a judgment (of 6 December 2007 in Case [C-300/06](#) *Voß*) interpreting Article 141 EC as precluding national legislation which, on the one hand, defines overtime for both civil servants working full time and those employed part time as hours worked over and above their normal working hours, and which, on the other hand, remunerates those additional hours at a rate lower than the hourly rate applied to their normal working hours, so that part-time civil servants are less well paid than full-time civil servants in respect of hours which are worked over and above their normal working hours, but which are not sufficient to bring the number of hours worked overall above the level of normal working hours for full-time civil servants, inasmuch as that legislation affects a considerably higher proportion of female than male workers, and as such difference in treatment is not justified by objective factors wholly unrelated to discrimination on grounds of sex.

Equal treatment as regards employment and working conditions, from the aspect this time of the prohibition of discrimination on grounds of age, forms the subject matter of Case [C-411/05](#) *Palacios de la Villa* (judgment of 16 October 2007), in which the central issue was the compatibility with Directive 2000/78⁽⁴⁰⁾ of Spanish legislation accepting the validity of compulsory retirement clauses contained in collective agreements stipulating automatic termination of the employment relationship when the worker has reached retirement age, set at 65 by that national law, and has fulfilled the other conditions for the grant of a retirement pension under their contribution regime. The Court considered that such a national measure is not contrary to the prohibition of discrimination on grounds of age, implemented by that directive, provided that that measure is objectively and reasonably justified by a legitimate aim relating to employment policy and the labour

⁽³⁹⁾ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24).

⁽⁴⁰⁾ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).



market, and that the means put in place to achieve that aim of public interest do not appear to be inappropriate and unnecessary for the purpose. After holding that the public-interest objective of regulating the labour market for the purpose, in particular, of checking unemployment and encouraging employment must, as a rule, be treated as justifying a difference in treatment on grounds of age, the Court concluded that that measure was appropriate and necessary because it took account of the fact that the persons concerned are entitled to a retirement pension and because management and labour are free to make use, by way of collective agreements, and therefore flexibly, of the compulsory retirement mechanism.

Finally, a question referred for a preliminary ruling by a Spanish court concerning the granting of length-of-service allowances allowed the Court to declare that the concept of 'working conditions', mentioned in Clause 4(1) of the framework agreement on fixed-term work ⁽⁴¹⁾, the provisions of which, just as those of Directive 1999/70 ⁽⁴²⁾ to which that framework agreement is annexed, can apply also to fixed-term employment contracts and relationships concluded with the public authorities and other public-sector bodies, may be the basis for a claim for the grant to a fixed-term worker of a length-of-service allowance reserved under national law solely to permanent staff (judgment of 13 September 2007 in Case [C-307/05 Del Cerro Alonso](#)). Furthermore, as the Court stated, it is contrary to that same provision to introduce a difference in treatment between fixed-term workers and permanent workers justified solely on the basis that it is provided for by a provision of statute or secondary legislation of a Member State or by a collective agreement concluded between the staff union representatives and the relevant employer.

The meaning of certain provisions of Community law concerning workers' rights and their protection was clarified by the Court in answer to various questions referred for a preliminary ruling. So, in Case [C-458/05 Jouini and Others](#) (judgment of 13 September 2007), the Court explained the notion of transfer of an undertaking as a result of a legal transfer within the meaning of Directive 2001/23 ⁽⁴³⁾, and stated that the latter concerned cases in which some of the administrative personnel and some of the temporary workers are transferred to another temporary employment business in order to carry out the same activities in that business for the same clients and the assets affected by the transfer are sufficient in themselves to allow the services characterising the economic activity in question to be provided without recourse to other significant assets or to other parts of the business, which is a matter for the referring court to establish. Case [C-278/05 Robins and Others](#) [2007] ECR I-1053 shed light on various problems relating to the protection of employees in the event of the insolvency of their employer, raised by a court of the United Kingdom of Great Britain and Northern Ireland in a reference for a preliminary

⁽⁴¹⁾ Framework agreement on fixed-term work, concluded on 18 March 1999, which is set out in the Annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

⁽⁴²⁾ Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

⁽⁴³⁾ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16).



ruling. Having regard to the considerable latitude enjoyed by the Member States in this sphere, it was held, in respect of Article 8 of Directive 80/987⁽⁴⁴⁾, that where the employer is insolvent and the assets of the supplementary company or inter-company pension schemes are insufficient, accrued pension rights need not necessarily be funded by the Member States themselves or be funded in full. Nor did the Court fail to remark that, when such a provision of Community law has not been properly transposed into domestic law, the liability of the Member State concerned is contingent on a finding of manifest and grave disregard by that State for the limits set on its discretion.

Environment

In Case [C-342/05](#) *Commission v Finland* (judgment of 14 June 2007) the Court had to consider whether, as the Commission maintained, by authorising wolf hunting the Republic of Finland had failed to fulfil its obligations under Directive 92/43/⁽⁴⁵⁾. By virtue of Article 12(1) and of Annex IV(a) to that directive, wolves are one of the animal species in need of strict protection. However, Article 16 of the directive provides for exceptional arrangements derogating from those prohibitions. By virtue of the provisions of domestic law transposing that article, the Finnish authorities have every year issued wolf-hunting permits by way of derogation. The Court noted first of all that it is settled case-law that even if the applicable national legislation is in itself compatible with Community law, a failure to fulfil obligations may arise due to the existence of an administrative practice which infringes that law, provided that that practice is, to some degree, of a consistent and general nature. It then found that Article 16 of the directive, in so far as it provides for an exception, must be interpreted strictly and must impose on the authority taking the decision the burden of proving that the necessary conditions are present for each derogation. In those circumstances, the Member States are required to ensure that all action affecting the protected species is authorised only on the basis of decisions containing a clear and sufficient statement of reasons which refers to the reasons, conditions and requirements laid down in that article. The favourable conservation status of the populations of the species concerned in their natural range constitutes a necessary precondition for the grant of the derogations provided for. The grant of such derogations is possible by way of exception only where it is duly established that they are not such as to worsen the unfavourable conservation status of those populations or to prevent their restoration at a favourable conservation status, the objective referred to in Article 16 of that directive. It is possible that the killing of a limited number of wolves, even if some of them may cause serious damage, may affect that objective. The Court concluded that a Member State which authorises wolf hunting on a preventive basis without its being established that the hunting is such as to prevent serious damage has failed to fulfil its obligations under Directive 92/43.

⁽⁴⁴⁾ Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 82, p. 16).

⁽⁴⁵⁾ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7).



Judicial cooperation in civil matters

In the sphere of cooperation in civil and judicial matters attention is drawn first of all to the judgment of 27 November 2007 in Case [C-435/06 C](#), interpreting for the first time the provisions of Regulation No 2201/2003 ⁽⁴⁶⁾. The Court held that that regulation applies to a single decision ordering the immediate taking into care and placement of a child outside the original home in a foster family when that decision was adopted in the context of rules of public law relating to child protection. Such a decision falls within the scope of the regulation for it relates to 'parental responsibility' and forms part of the concept of 'civil matters'; and that latter concept must be interpreted autonomously and may therefore extend to measures which, from the point of view of the legal system of a Member State, fall within the ambit of public law. In addition, the Court considered that harmonised national legislation on the recognition and enforcement of administrative decisions on the taking into care and placement of persons, adopted in the context of Nordic cooperation, may not be applied to a decision to take a child into care that falls within the scope of that regulation. In accordance with Article 59(1) of the regulation, the latter supersedes for the Member States conventions concluded between them and relating to matters governed by it. Cooperation between the Nordic States does not appear amongst the exceptions listed exhaustively in that regulation. The Court also indicated that that interpretation is not invalidated by the Joint Declaration on Nordic Cooperation, annexed to the Treaty concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded ⁽⁴⁷⁾. According to that declaration, in fact, those States which are members of the Nordic Committee for Cooperation and members of the Union have undertaken to continue that cooperation, in compliance with Community law. That cooperation must therefore observe the principles of the Community legal order.

Next to be noted is Case [C-386/05 Color Drack](#) (judgment of 3 May 2007), in which the Court was led to interpret Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. According to that provision, a defendant may be sued, in matters relating to a contract, in the courts for the place of performance of the obligation in question, it being made clear that, in the case of the sale of goods, that place is, unless otherwise agreed, the place in a Member State where, under the contract, the goods were or ought to have been delivered. The Court stated that that provision is applicable where there are several places of delivery within a single Member State and that, in such a case, the court having jurisdiction to hear all the claims based on the contract for the sale of goods is that for the principal place of delivery, which must be determined on the basis of economic criteria. In the absence of determining factors for establishing the principal

⁽⁴⁶⁾ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, as amended by Council Regulation (EC) No 2116/2004 of 2 December 2004 (OJ 2004 L 367, p. 1).

⁽⁴⁷⁾ Joint Declaration No 28 on Nordic Cooperation, annexed to the Treaty concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1).



place of delivery, the plaintiff may sue the defendant in the court for the place of delivery of his choice.

Police and judicial cooperation in criminal matters, and combating terrorism

In its judgment of 3 May 2007 in Case [C-303/05](#) *Advocaten voor de Wereld*, the Court found no factor capable of affecting the validity of Council Framework Decision 2002/584/JHA ⁽⁴⁸⁾. The framework decision is not intended to harmonise the substantive criminal law of the Member States: it provides for approximation of the laws and regulations of the Member States with regard to judicial cooperation in criminal matters and its purpose is to introduce a simplified system for the surrender, between national judicial authorities, of convicted persons or suspects for the purpose of enforcing judgments or conducting criminal proceedings. It was not adopted in a manner contrary to Article 34(2) EU, which lists and defines, in general terms, the different types of legal instruments which may be used in the pursuit of the objectives of the Union set out in Title VI of the Treaty on European Union, and cannot be construed as meaning that the approximation of the laws and regulations of the Member States by the adoption of a framework decision cannot relate to areas other than those mentioned in Article 31(1)(e) EU and, in particular, the matter of the European arrest warrant. Nor does Article 34(2) EU establish any order of priority between the different instruments listed. While it is true that the European arrest warrant could equally have been the subject of a convention, it is within the Council's discretion to give preference to the legal instrument of the framework decision in the case where, as here, the conditions governing the adoption of such a measure are satisfied. This conclusion is not invalidated by the fact that the framework decision was to replace from 1 January 2004, solely in relations between Member States, the corresponding provisions of the earlier conventions on extradition. Any other interpretation, unsupported by either Article 34(2) EU or any other provision of the Treaty on European Union, would risk depriving of its essential effectiveness the Council's recognised power to adopt framework decisions in fields previously governed by international conventions. Moreover, the fact that the framework decision dispenses with verification of the requirement of double criminality in respect of certain offences is in keeping with the principle of the legality of criminal offences and penalties and with the principle of equality and non-discrimination.

In Case [C-467/05](#) *Dell'Orto* (judgment of 28 June 2007), the Court was called upon to rule on the concept of victim for the purposes of Council Framework Decision 2001/220/JHA ⁽⁴⁹⁾. It ruled that, in criminal proceedings and, in particular, in enforcement proceedings following a judgment which resulted in a final criminal conviction, the concept of 'victim' for the purposes of that framework decision does not include legal persons who have suffered harm directly caused by acts or omissions violating the criminal law of a Member State, the legislature's object being to limit its scope exclusively to natural persons who are victims of

⁽⁴⁸⁾ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1).

⁽⁴⁹⁾ Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (OJ 2001 L 82, p. 1).



harm resulting from a criminal act. This interpretation cannot, according to the Court, be challenged on the ground that it is not in keeping with the provision of Directive 2004/80⁽⁵⁰⁾ relating to compensation to crime victims, for even supposing that the provisions of a directive adopted on the basis of the EC Treaty were capable of having any effect on the interpretation of the provisions of a framework decision based on the Treaty on European Union and that the concept of victim for the purposes of the directive could be interpreted to include legal persons; the directive and the framework decision regulate different fields and are not linked in a manner calling for a uniform interpretation of the concept in question.

Several of the Court's judgments relate to the combating of terrorism.

In Case [C-229/05 P PKK and KNK v Council](#) [2007] ECR I-439, in the particular instance of Regulation No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, the Court stressed the requirements linked to the right of individuals to effective judicial protection.

In the context of the implementation of Resolution 1373 (2001) of the United Nations Security Council, the Council of the European Union decided in 2002 to include the Kurdistan Workers' Party (PKK) in a list of terrorist organisations, which led to the freezing of its funds. An action challenging that decision was brought by a first applicant on behalf of the PKK and by a second applicant on behalf of the Kurdistan National Congress (KNK). The Court of First Instance having rejected the action as inadmissible, the two applicants lodged an appeal before the Court of Justice.

The latter held, in particular, that in respect of the abovementioned regulation, it is especially important for judicial protection to be effective because the restrictive measures laid down by that regulation have serious consequences. Not only are all financial transactions and financial services thereby prevented in the case of a person, group or entity covered by the regulation, but also their reputation and political activity are damaged by the fact that they are classified as terrorists.

According to Article 2(3) of Regulation No 2580/2001⁽⁵¹⁾, read in conjunction with Article 1(4) to (6) of Common Position 2001/931/CFSP⁽⁵²⁾, a person, group or entity can be included in the list of persons, groups and entities to whom and to which that regulation applies only if there is certain reliable information, and the persons, groups or entities covered must be precisely identified. In addition, it is made clear that the names of persons, groups or entities can be kept on the list only if the Council reviews their situation periodically. All these matters must be open to judicial review.

The Court concluded therefrom that if the Community legislature takes the view that an entity retains an existence sufficient for it to be subject to the restrictive measures laid down

⁽⁵⁰⁾ Council Directive 2004/80/EC of 29 April 2004 (OJ 2004 L 261, p. 15).

⁽⁵¹⁾ Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70).

⁽⁵²⁾ Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93).



by Regulation No 2580/2001, it must be accepted, on grounds of consistency and justice, that that entity continues to have an existence sufficient to contest those measures. The effect of any other conclusion would be that an organisation could be included in the list of terrorist organisations without being able to bring an action challenging its inclusion.

In consequence, the Court set aside the order of the Court of First Instance in so far as it dismissed the application of the appellant acting on behalf of the PKK.

In Case [C-354/04 P](#) *Gestoras Pro Amnistía and Others v Council* [2007] ECR I-1579 and [C-355/04 P](#) *Segi and Others v Council* [2007] ECR I-1657, the Court rejected the appeals brought by two organisations seeking damages for the harm allegedly sustained as a result of their inclusion in the list of persons, groups or entities involved in terrorist acts, annexed to a common position of the Council ⁽⁵³⁾.

First, the Court observed that, in the framework of Title VI of the Treaty on European Union on police and judicial cooperation in criminal matters, the Community legislature has conferred no jurisdiction on the Court of Justice to entertain any action for damages whatsoever.

Nevertheless, the Court continued, applicants wishing to challenge before the courts the lawfulness of a common position are not deprived of all judicial protection. Article 35(1) EU, in that it does not enable national courts to refer a question to the Court for a preliminary ruling on a common position but only a question concerning decisions or framework decisions, treats as acts capable of being the subject of such a reference for a preliminary ruling all measures adopted by the Council and intended to produce legal effects in relation to third parties. Given that the preliminary ruling procedure is designed to guarantee observance of the law in the interpretation and application of the Treaty, the right to make a reference to the Court for a preliminary ruling must therefore exist in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties.

Therefore, a national court hearing a dispute which indirectly raises the issue of the validity or interpretation of a common position adopted on the basis of Title VI of the Treaty on European Union and having serious doubts whether that common position is really intended to produce legal effects in relation to third parties, could ask the Court to give a preliminary ruling. It would then fall to the Court to find, where appropriate, that the common position is intended to produce legal effects in relation to third parties, to accord it its true classification and to give a preliminary ruling.

Finally, the Court found that it is for the courts and tribunals of the Member States to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the lawfulness of any decision or other national measure relating to the drawing up of an act of the European Union or to its application to them and to seek compensation for any loss suffered.

⁽⁵³⁾ Council Common Position 2002/340/CFSP of 2 May 2002 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2002 L 116, p. 75).



The Court concluded, therefore, that the appellants had not been deprived of effective judicial protection and that the orders of the Court of First Instance had not prejudiced their right to such protection.

In Case [C-117/06 Möllendorf and Möllendorf-Niehuus](#) (judgment of 11 October 2007) the Court essentially decided that a contract for the sale of immovable property must not be performed if Community law has, in the meantime, ordered the purchaser's economic resources to be frozen.

Hearing an action challenging the refusal of the Grundbuchamt (the authority responsible for keeping the land register) to make the final registration of a transfer of property, a necessary condition for the purchase of ownership of immovable property in German law, a German court asked the Court whether those provisions of Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban ⁽⁵⁴⁾ forbid the registration of the transfer of ownership to a purchaser who has, after the conclusion of the contract of sale, been entered in the list of persons associated with Usama bin Laden, the Al-Qaeda network and the Taliban, annexed to that regulation.

The Court replied that they do, finding that in a situation in which both the contract for the sale of immovable property and the agreement on the transfer of ownership of that property have been concluded before the date on which the purchaser is included in the list in Annex I to that regulation, and in which the sale price has also been paid before that date, Article 2(3) of Regulation (No 881/2002 must be interpreted as prohibiting final registration, in performance of that contract, of the transfer of ownership in the land register after that date.

The Court held that that provision applies to any mode of making available an economic resource and therefore also to any act flowing from the execution of a contract imposing mutual obligations and which has been agreed in exchange for payment of pecuniary consideration. Further, Article 9 of that regulation must be understood as meaning that the measures laid down in the regulation, which include the freezing of economic resources, also prohibit the completion of acts which implement contracts concluded before the entry into force of that regulation.

⁽⁵⁴⁾ Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ 2002 L 139, p. 9), as amended by Council Regulation (EC) No 561/2003 of 27 March 2003 (OJ 2003 L 82, p. 1).

